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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 329

H. [illegible] BUCK, Individually and as President of the American Society of Dowsers, Authors and Publishers, et al.,

Appellants,

vs.

PHIL H. GALLAGHER, Individually and as State Treasurer of the State of Washington, et al.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

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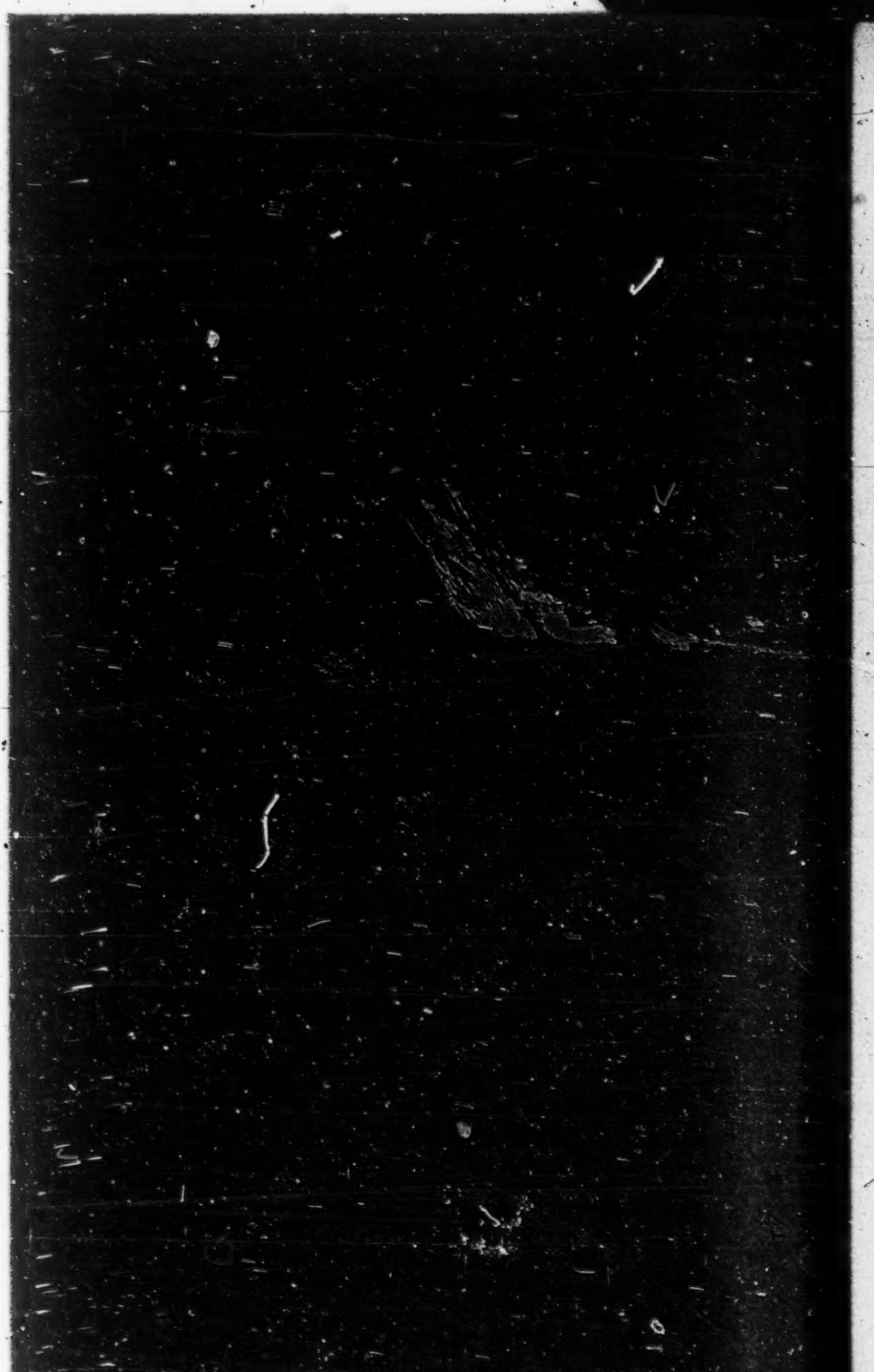

INDEX.

Subject Index.

	Page
(a) The statutory provisions sustaining the jurisdiction	1
(b) The statute of the State of Washington, the validity of which is involved	2
Washington Session Laws, 1937, ch. 218, pp. 1070-1085	2
(c) The order granting interlocutory injunction sought to be reviewed	2
(d) The nature of the case and of the rulings of the court	2
(e) Cases sustaining the jurisdiction of the Supreme Court of the United States	4
(f) Summary of provisions of State statute	4
(g) The substantial questions involved	9
Question 1. Does the bill of complainants alone disclose that the value of the matter in controversy is in excess of $3,000 exclusive of interest and costs and incidentally do the affidavits presented on the application for the preliminary injunction support the bill in that respect?	9
Question 2. Did the court below have jurisdiction regardless of the amount involved in view of the substantial claim that the State statute denies equal protection of the laws and denies to complainants certain privileges and immunities of citizens of the United States?	13
Question 3. Is there a substantial claim that the statute violates Article I, Section 8, Clause 8 of the Constitution of the United States?	14
Question 4. Does the State statute deprive complainants of their property without due process of law?	17

Page

Question 5. Does the State statute interfere with treaties between the United States and foreign countries respecting copyrights and with proclamations of the President of the United States recognizing the existence of certain reciprocal conditions between the United States and foreign countries in respect of copyrights? 19

(h) The abuse of discretion in denying the interlocutory injunction 20

Appendix "A"—State Statute (Ch. 218, Laws of Washington, 1937, p. 1070) 4, 21

Appendix "B"—Opinion of May 9, 1938 34

Appendix "C"—Opinion of February 9, 1938 65

TABLE OF CASES CITED.

A. B. Small Co. v. *American Sugar Ref. Co.*, 267 U. S. 233 19

Bank of America v. *Whitney Central Nat. Bank*, 261 U. S. 171 17

Beatty v. *Kurtz*, 2 Pet. 566, 584-5 10

Buck v. *Elm Lodge, Inc.*, 83 F. (2d) 201 (C. C. A. 2) 2, 10

Buck v. *Jewell-LaSalle R. Co.*, 283 U. S. 191 2, 15

Caledonian Coal Co. v. *Baker*, 196 U. S. 432, 444 17

Chipman, Ltd., v. *Jeffery Co.*, 251 U. S. 373, 379 17

Cline v. *Frink Dairy Co.*, 274 U. S. 455, 457 18

Connally v. *General Const. Co.*, 269 U. S. 385, 391, 393-5 18

Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540, 562 14

Cooper Mfg. Co. v. *Ferguson*, 113 U. S. 727 17

Dobbins v. *Los Angeles*, 195 U. S. 223, 240 14

F. A. D. Andrea, Inc., v. *Radio Corp. of America*, 88 F. (2d) 474, aff'g 14 F. Supp. 226 (C. C. A. 3) 15

Grosjean v. *American Press Co.*, 297 U. S. 233, 241-2 13

Gully v. *Inter-State Natural Gas Co.*, 292 U. S. 16, 19 4

Harms v. *Cohen*, 279 Fed. 276, 279-81 (E. D. Pa.) 2

Harrison v. *St. L. & San Francisco R. R.*, 232 U. S. 318, 328, 331 13, 18

	Page
Haynes v. *Fraternal Aid Union*, 34 F. (2d) 305, 308 (D. C. Kans.)	10
Heiner v. *Donnan*, 285 U. S. 312, 328	18
Henry Bill Pub. Co. v. *Smythe*, 27 Fed. 914, 917 (S. D. Ohio)	16
Herbert v. *Shanley*, 242 U. S. 591	15
Interstate Busses Corp. v. *Blodgett*, 276 U. S. 245, 249	4
James v. *Campbell*, 104 U. S. 356, 358	15
Jewell-LaSalle R. Co. v. *Buck*, 283 U. S. 202	2
Local Union No. 497 v. *Joplin Ry. Co.*, 287 Fed. 473, 475 (C. C. A. 8)	10
Manley v. *Georgia*, 279 U. S. 1, 6	18
McFarland v. *American Sugar Co.*, 241 U. S. 79, 86	14
Minnesota C. M. Assn. v. *Benn*, 261 U. S. 140, 145	17
Morrison v *California*, 291 U. S. 82, 90	18
Old Wayne Life Assn. v. *McDonough*, 204 U. S. 8	17
174th St. & St. N. Amusement Co. v. *Maxwell*, 169 N. Y. Supp. 895	2
Paul v. *Virginia*, 8 Wall, 168, 180	13
People's Tobacco Co. v. *American Tobacco Co.*, 246 U. S. 79, 87	17
Raich v. *Truax*, 219 Fed. 273, 283, aff'd 239 U. S. 33 (1915)	13
Shannahan v. *United States*, 82 L. Ed. 740 (Adv. Sheets, April 25, 1938)	4
Shields v. *Thomas*, 17 How. 3, 4	10
Smith v. *Swormstedt*, 16 How. 288, 302-3	10
Society of European S. A. and C., Inc., v. *New York Statler Hotel, Inc.*, 19 F. Supp. 1 [1937, S. D. N. Y.]	15
Terral v. *Burke Construction Co.*, 257 U. S. 529, 532	13
Texas & Pac. Ry. v. *Gentry*, 163 U. S. 353, 361	10
Troy Bank v. *Whitehead & Co.*, 222 U. S. 39, 40	10
United States v. *Bell Telephone Co.*, 167 U. S. 224, 249-50	15
United States v. *Cohen Grocery Co.*, 255 U. S. 81	18, 19
United States v. *Dubilier Condenser Corp.*, 289 U. S. 178, 186, 189	15

STATUTES CITED.

	Page
Act of the Washington Legislature of March 19, 1937, being Chapter 218 of the Laws of Washington, 1937 (Session Laws, 1937, Chapter 218, pp. 1070 to 1085), Section 2	5
Section 3	5, 15, 16
Section 4	6
Section 5	6
Section 6	7
Section 7	7, 16, 17
Section 8	7, 8, 16, 17
Section 9	8, 9, 16, 17
Section 10	9, 16
Section 11	9, 17
Section 12	9
Section 13	9
Constitution of the United States, Art. I, Sec. 8, Clause 7	5
Constitution of the United States, Art. I, Sec. 8, Clause 8	3, 14
Copyright Act of March 4, 1909 (35 Stat. L., pp. 1075-1088, as amended (U. S. C., Tit. 17)	3, 14, 19
Equity Rules, Rule 37	10
Rule 38	10
Judicial Code, Section 24, subd. 14 (28 U. S. C. 41)	13
Section 238 (28 U. S. C. 345)	1
Section 266 (28 U. S. C. 380)	1
United States Code, Title 28, Section 1	14
Section 9	5
Section 12	5
Section 18	8
Sections 42-46	6
Section 56	6
Section 57	6

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

In Equity.

No. 606

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL., *Complainants,*

vs.

OTTO CASE, AS STATE TREASURER OF WASHINGTON, ET AL., *Defendants,*

K. M. O., INC., A CORPORATION, *Intervening-Defendant,*

JOHN G. LOCKHART, *Intervening-Defendant.*

STATEMENT AS TO JURISDICTION.

(a) The Statutory Provisions Sustaining the Jurisdiction.

The complainants rely upon Judicial Code, Sec. 238 (U. S. C., Tit. 28, Sec. 345) and Judicial Code, Sec. 266 (U. S. C., Tit. 28, Sec. 380), respectively, as amended, as sustaining the jurisdiction of the Supreme Court of the United

States to review the above entitled cause upon appeal, the decree appealed from having been made by a specially constituted three-judge court.

(b) The Statute of the State of Washington, the Validity of Which Is Involved.

The Statute of the State of Washington, the validity of which is involved is the Act of March 19, 1937, being Chapter 218 of the Laws of Washington, 1937. (Session Laws, 1937, Chapter 218, pp. 1070 to 1085, inclusive). A copy of this Statute is hereto annexed as Appendix "A" and will be referred to herein as the "State Statute". Its provisions are summarized below.

(c) The Order Granting Interlocutory Injunction Sought to Be Reviewed.

The decree and order appealed from were dated and entered June 28, 1938. The petition for appeal was presented August 1, 1938.

(d) The Nature of the Case and of the Rulings of the Court.

This action was brought by several owners of copyrighted musical compositions in their individual capacities as well as in their joint capacities as members of the American Society of Composers, Authors and Publishers (hereinafter referred to as the "Society") [1] to enjoin enforcement of a

[1] This Society is an unincorporated association consisting of 1,000 composer and author members and 123 publisher members. All members of the Society grant it for limited periods of time the exclusive right to license the public performance for profit of their copyrighted musical compositions. The Society in turn issues licenses to users on the joint behalf of all its members. Its rights have been the subject of many adjudications. (*Buck* v. *Elks Lodge, Inc.*, 83 F. (2d) 201 (C. C. A. 2); *Buck* v. *Jewell-LaSalle R. Co.*, 283 U. S. 191; *Jewell-LaSalle R. Co* v. *Buck*, 283 U. S. 202; *Harms* v. *Cohen*, 279 Fed. 276, 279-81 (E. D. Pa.); *174th St. & St. N. Amusement Co.* v. *Marwell*, 169 N. Y. Supp. 895.)

Statute of the State of Washington (hereinafter referred to as the "State Statute") on the ground that such Statute is in conflict with the copyright provisions of the Federal Constitution (Art. I, Sec. 8, Clause 8) and the Copyright Act of 1909, as amended, enacted thereunder (Act of March 4, 1909, 35 Stat. L. pp. 1075-1088 as amended; U. S. Code, Tit. 17), and that it deprives complainants of their property without due process of law, and denies equal protection of the laws.

The verified bill of complaint, motion for temporary injunction and supporting affidavits were filed May 28, 1937. The motion for temporary injunction was heard pursuant to court order before Hon. Bert Emory Haney, Circuit Judge, and Hon. John C. Bowen and Hon. Edward E. Cushman, District Judges, on June 28, 1937.[2]

Almost a year thereafter, on May 9, 1938, an opinion was filed by Judge Cushman dismissing the bill of complaint and denying the interlocutory injunction on the ground "that there is no competent evidence showing that the matter in controversy exceeds, exclusive of interest and costs, $3,000.00". The court held that the affidavits were incompetent as evidence because of the motions to dismiss, and that in any event the affidavits could not be considered because the court would not "be warranted in accepting, without opportunity for cross-examination, the statement of an owner as to the value of his property unless it was a statement against interest".

At the foot of its opinion, the Court made provision for "additional orders or rulings" if desired.

Believing that the purpose of this provision was to give complainants an opportunity to present oral proof in support of their averments as to jurisdictional amount, they

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[2] At the hearing on June 28, 1937, the petitions of K. M. O. Inc. and John G. Lockhart to intervene were granted and they, as well as the original defendants, filed motions to dismiss. No answer has been interposed by either the defendants or the intervening defendants.

applied for an order permitting them to give such testimony in open court or by deposition. As a manifestation of their good faith complainants, pursuant to an order to show cause, produced in open court in Tacoma, Washington, three witnesses who journeyed from New York City, and one from Los Angeles, including the president, chairman of the administration committee and a director of the Society whose testimony was offered to support the averments in the bill and affidavits, and to give defendants' counsel ample opportunity for cross-examination.

The learned court below refused to permit those witnesses to testify and thereupon dismissed the bill and denied the interlocutory injunction for failure to show the requisite jurisdictional amount.

Complainants contend first, that their bill of complaint, both alone and in conjunction with the supporting affidavits, amply alleges the necessary facts as to the existence of the jurisdictional amount, and secondly, that if there be any doubt as to the truth of the facts therein stated, the Court erred in denying to complainants an opportunity to establish the facts by examination of witnesses in open court.

(e) Cases Sustaining the Jurisdiction of the Supreme Court of the United States.

Interstate Busses Corp. v. *Blodgett*, 276 U. S. 245, 249;
Shannahan v. *United States*, 82 L. Ed. 740 (Adv. Sheets, Apr. 25, 1938);
Gully v. *Inter-State Natural Gas Co.*, 292 U. S. 16, 19.

(f) Summary of Provisions of State Statute.

(Ch. 218, Washington Sessions Laws, 1937, p. 1070.)

The State Statute directly affects complainants' copyrighted works in the following way:

1. Performance of copyrighted works without the consent of the owner is made unlawful (Section 2).

2. The combination within or without the State by two or more persons owning copyrights for the purpose of fixing prices for the use of their copyrighted works or for the purpose of collecting copyright royalties, or of issuing blanket licenses in the State for the right to commercially use their separate copyrighted works is unlawful (Section 3).

3. Notwithstanding the provision making it unlawful for two or more persons to combine as aforesaid, such persons may combine if they issue licenses "on rates assessed on a per piece system of usage", and provided further, that rates assessed on such per piece basis are not in excess of those charged by any group in any other State (Section 3).[4]

4. A single sale of the right of public performance for profit within or without the State, bars all copyright owners, whether members of a combination or not, from thereafter restricting the use of their copyrighted works (Section 3).[5]

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[3] This section merely does lip service to the Federal Copyright Law. In the first place, the enforcement of that law is delegated to the Federal Government exclusively under Article I, Section 8, Clause 7 of the Federal Constitution. In the second place, the subsequent provisions of the State Statute expressly authorize performance of copyrighted works without the consent of the copyright owners.

[4] It is complainants' contention that this section is a direct interference with their rights as copyright owners to determine the prices and the conditions under which their works may be performed, that it is unworkable and in effect, confiscates their copyrights as well as nullifies existing contracts between the complainant Society and its members, and between the complainant Society and 528 commercial users of music in the State of Washington.

[5] Since there can be no right to issue licenses unless the licenser has the right to restrict authors from using the copyrighted work, this clause bars complainants from issuing licenses in the State of Washington. All the members of the Society, including the complainants, have sold to the Society the exclusive right to the use of their copyrighted works in public performance for profit until December 1, 1940. Under the State Statute, they are therefore barred from further restricting such performances.

5. All copyright owners who combine "*whether for lawful purpose or otherwise*" must file annually under oath with the Secretary of State of the State of Washington two copies of a complete list of all their copyrighted works, "whether musical or dramatic or of any other classification", stating the date each separate work was copyrighted, the name of the author, the date of any assignment of the work or of any interest therein, the name of the publisher, the name of the present owner, together with the addresses and residences of all parties who have at any time had any interest in such copyrighted work (Section 4). The alleged purpose of this section is that all users in the State of Washington may know the rights and titles to the copyrighted works claimed by such persons, and to enable such users to avoid using copyrighted compositions (Section 5).*

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* The Copyright Law itself amply safeguards all users against innocent infringement by providing that every copy of the copyrighted work must bear a notice of copyright; that copies must be deposited in the Office of the Register of Copyrights; that the copyright notice must state the name of the proprietor and the year in which copyright was secured (17 U. S. C., Sections 9, 12, 18). Assignments of copyrights must be recorded with the Register of Copyrights (17 U. S. C., Sections 42-46). The Register of Copyrights keeps a full index of all copyright registrations and assignments which is printed at periodic intervals, furnished to all parties desiring them at a nominal price (17 U. S. C., Sections 56, 57). The record books of the copyright office are open to public inspection. The State Statute sets up a new system of registration distinct from and in conflict with that set up by Congress.

The information required to be filed has no possible relation to any public interest of the State of Washington and its purpose can only be to harass and annoy complainants and to make it so expensive and impossible to comply with the State Statute as to cause complainants to abandon any attempt to enforce and protect their copyrights in the State of Washington.

A very likely reason for this requirement is that the list would make it simple for the State of Washington to execute an involuntary assignment to itself, under Section 9 of the Statute, of all of complainants' copyrighted works without going to the necessary expense of examining the copyright entries in the office of the Register of Copyrights in Washington, D. C.

6. These lists must be filed even if the copyright owners affected are not doing business in the State of Washington so long as renditions of their copyrighted works may be originating from a point outside the State and may be heard within the State (Section 6).[7]

7. The production, creation and commercial use of copyrighted music within the State of Washington even though originating from a point without the State, is declared to be affected by the public interest in such Statute (Section 7).

8. Copyright owners who fall within the condemnation of the statute are denied the right to sue in the Federal courts in that suits for infringement of copyright or threats of such suits are prohibited; the copyrights of offenders are given a fictitious legal *situs* within the State of Washington (Section 7). If such persons issue licenses "either from within or from without the State", they are deemed to be doing business within the State of Washington.

9. Detecting infringements and notifying users of such infringements are referred to in the Statute as "the business of spying upon and the warning of users" (Sec. 8). Such conduct on the part of copyright owners "in addition to the presence within the State of such persons, * * * shall be *conclusive* evidence that such combinations and persons, even though non-residents, have accepted the privileges of doing business within this State" (Sec. 8).

10. If any agent, attorney, representative or investigator of any such copyright owner uses any privileges available

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[7] All complainants' works have been heard within the State at one time or another and there is no way of preventing performances of their works by means of radio broadcasting from crossing the borders of the State of Washington and being heard within that State. In fact, the interstate nature of such broadcasts is the very foundation for the Federal Communications Act.

to a citizen of the State of Washington, the copyright owner is deemed to have accepted all the provisions of the Statute; his licensees are deemed aiders and abettors, and he is deemed to have appointed the Secretary of State of the State of Washington as his attorney upon whom process may be served (Sec. 8).

11. If any attempt is made by such copyright owners to evade or render ineffectual the enforcement of the Statute, injunction proceedings will be commenced against them in the State courts by service upon the Secretary of State, and a receiver will be appointed of all their copyrighted works and property, tangible or intangible, regardless of the actual *situs* of their property. The receiver is directed to seize the copyrighted works of all such owners "including all of the rights to suits for infringement and damages in both State and Federal courts, and all choses in action and all sums due on contracts and licenses" (Sec. 9).[5]

12. Upon any attempt of such copyright owners to withdraw their copyrighted works from the State, the receiver must compile a list of all their copyrighted works which have been used in the State (which include practically all of their works); and the court must convene a so-called Anti-Monopoly Board, which board must determine and fix a rate that the receiver shall charge for the single and separate public performance for profit of each copyrighted work of the defendants "on a per piece basis * * * of

[5] In other words, if complainants should decide that in view of the cost of complying with the Statute (which cost will exceed $300,000) as contrasted with the relatively small amount secured from the licensing of their works in the State of Washington ($60,000 annually), and should prefer to abandon the issuing of licenses and to treat all persons performing their works as infringers, they will be unable to sue for infringement in the Federal Courts because all right to sue for infringement will have been taken over by the receiver appointed in a manner which offends the constitutional provisions of due process and equal protection of the laws.

o much money per each time a piece of music is played or sed in a public performance for profit" (Sec. 9).

13. Failure to appear in said court proceedings for a pe-iod of one year, results in the escheat and forfeiture to the State of Washington of all their copyrighted works, and the xecution of an involuntary assignment of all the legal and quitable titles to all of the copyrighted works to the State f Washington to be filed with the Register of Copyrights t Washington, D. C. (Sec. 9).

14. If complainants, who are non-residents, should ap-ear in the State courts for the purpose of contesting the alidity of the constructive service upon them in the form utlined in the Statute, such special appearance shall "be leemed to be as a general appearance even though the proc-ss may have been insufficient" (Sec. 10).[9]

15. The penalties against any offending copyright own-rs, as well as against any of their licensees, agents, repre-entatives, investigators and attorneys is a fine not exceed-ng $500 or imprisonment for not more than six months, r both (Sec. 11).[10]

(g) The Substantial Questions Involved.

This appeal involves the following substantial questions:

Question 1. Does the bill of complainants alone disclose hat the value of the matter in controversy is in excess of

[9] Strangely enough this section has a proviso that it shall not be con-trued as denying complainants of their rights without due process of aw (Sec. 10).

[10] The remaining sections of the Statute provide that if any portion of he Act is declared unconstitutional, such holding shall not affect the valid-ty of the balance of the Statute (Sec. 12); and that where more than one njunction suit is instituted in different counties, orders may be issued gainst the defendants in each of the counties, but if there is a receiver-hip and the defendants are the same the actions are to be consolidated n one county (Sec. 13).

$3,000, exclusive of interest and costs, and, incidentally, do the affidavits presented on the application for the preliminary injunction support the bill in that respect?

This action is brought on behalf of all members of the complainant Society (an unincorporated association) to redress an injury to property rights in which all such members have a joint and common interest (Compl., pars. 1, 2, 18, 19, Exs. "B", "C" and "D", annexed to compl.).[11]

The matter in controversy between the complainant Society and the defendants exceeds the value of $3,000 as shown by the following allegations of the bill:

(1) The Statute interferes with and destroys 528 contracts between the Society and users in Washington, from whom the Society, on behalf of all its members jointly, has received and would continue to receive, but for the Statute, $60,000 annually, which sum has been lost to it (Compl., pars. 24, 26, Exs. "F", "G" and "H"). The Society has not received any payments since the effective date of the Statute—a period of more than one year (Offer of Proof, Hearing, June 28, 1938, pp. 15, 16; Compl., pars. 27, 28, 35-A, 36).[12]

(2) It would cost the Society in excess of $300,000 to compile a list containing the information required by the Statute as to the copyrights of its own members, and interests therein, and an additional $50,000 as to the copyright

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[11] Equity Rules 37, 38; *Smith* v. *Swormstedt*, 16 How. 288, 302-3; *Beatty* v. *Kurtz*, 2 Pet. 566, 584-5; *Local Union No. 497* v. *Joplin Ry. Co.*, 287 Fed. 473, 475 (C. C. A. 8); *Buck* v. *Elm Lodge*, 83 F. (2d) 201 (C. C. A. 2).

[12] The amount in controversy is $60,000—not the aliquot ultimate interest of each of the members of the Society therein. *Troy Bank* v. *Whitehead & Co.*, 222 U. S. 39, 40; *Local Union No. 497* v. *Joplin Ry. Co.*, 287 Fed. 473, 475 (C. C. A. 8); *Haynes* v. *Fraternal Aid Union*, 34 F. (2d) 305, 308 (D. C. Kans.); *Shields* v. *Thomas*, 17 How. 3, 4. The value of these contracts is the amount involved. (*Texas & Pac. Ry.* v. *Gentry*, 163 U. S. 353, 361.)

of members of foreign societies, whose copyrights the Society licenses under reciprocal contracts (Compl., pars. 25, 26).

The affidavits further show:

(1) If the Society fails to comply with the Statute all its contracts and interests in copyrights throughout the United States will be seized and escheated and forfeited to the State of Washington. It will lose $3,200,000 as its annual license fees from radio broadcasting stations alone (Aff. of Buck, p. 38).

(2) It would cost the Society annually in excess of $2,000,000 to attempt to conform its operations throughout the United States to the requirements of the State Statute—an undertaking so prohibitive as to either force the Society to disband or to make license fees so absolutely exorbitant as to make it impossible for the establishment to operate (Aff. of Buck, pp. 49-55). Unless the Society changes its operations outside the State of Washington to conform with the Statute's requirements it will obviously be guilty of violating the Statute.

The matter in controversy between each of the *individual* complainants and the defendants exceeds the value of $3,000 as shown by the following:

(1) They will lose the amounts which they now receive from the Society, since the Statute compels them to surrender their membership. The contracts of each do not expire until December 31, 1940. On the basis of past annual receipts in excess of $50,000 each, complainants Carl Fischer, Inc., G. Schirmer, Inc., and Irving Berlin, Inc., will each suffer a net loss in excess of $200,000 (Aff. of W. Fischer, p. 3; S. H. Bornstein, pp. 3-4; G. Schirmer, pp. 3-4; Compl., par. 36); complainant Nevin will lose in excess

of $12,000 (Aff. of A. P. Nevin, p. 2); complainant Taylor will lose in excess of $15,000 (Aff. of D. Taylor, p. 3); complainant Bartlett will lose in excess of $25,000 (Aff. of E. H. Bartlett, p. 2).

(2) Compliance with the requirements of the Statute would cost each of the complainants, Carl Fischer, Inc., G. Schirmer, Inc., and Irving Berlin, Inc., annually in excess of $75,000, being allocated as follows: $25,000 for filing the requisite lists, $25,000 in attempting to fix prices per piece for various uses of different copyrighted compositions in the hundreds of establishments in Washington performing the respective complainants' copyrighted music publicly for profit, and $25,000 to detect and sue for infringement—all of which expenses are presently unnecessary under the system of issuing blanket licenses (Compl., par. 8; aff. of S. H. Bornstein, pp. 5-12; aff. of W. S. Fischer, pp. 2-4; aff. of G. Schirmer, pp. 2-4). Compliance with such provisions would cost each of the other complainants individually in excess of $5,000 (Affs. of A. P. Nevin, p. 9; D. Taylor, p. 4; E. H. Bartlett, p. 6).

(3) If complainants fail to comply with the Statute, each of them will suffer the forfeiture of all copyrights and interest therein to the State of Washington in a suit wherein process will be served on a fictitious "agent", based on fictitious definitions of "doing business" and of "situs" of copyrights. The value of copyrights owned by complainants Carl Fischer, Inc., G. Schirmer, Inc., and Irving Berlin, Inc., is in excess of $1,000,000 each (Compl., par. 8; aff. of W. S. Fischer, pp. 3-4; S. H. Bornstein, pp. 3-4; G. Schirmer, pp. 1-4). Each of the other complainants has interests in copyrights including renewal rights valued in excess of $100,000, all of which will be confiscated (Compl., pars. 11, 12, 13 and 14). In addition they will be fined not exceeding $500 and/or imprisoned not more than

x months for each offense resulting in penalties of $250,-
0 against each complainant who attempts to assert his
nstitutional rights against the 528 users in Washington.

As a matter of fact, the individual complainants have
ither the resources, funds, organization nor ability to pro-
t their copyrighted musical works against infringement
d if they are deprived of the right to combine, they will
ve to surrender and forfeit the right of public perform-
ce for profit which is given to them under their respec-
e copyrights (Compl. par. 21).

It seems clear that facts showing the necessary jurisdic-
nal amount are amply alleged as to each of the com-
ainants individually, as well as jointly in their capacities
members of the Society. In any event it is sufficient
the necessary jurisdictional amount be shown as to any
e complainant. (*Grosjean* v. *American Press Co.*, 297
S. 233, 241-2.)

Question 2. Did the court below have jurisdiction regard-
ss of the amount involved in view of the substantial claim
at the State Statute denies equal protection of the laws
d denies to complainants certain privileges and immuni-
s of citizens of the United States?

Where such a claim is made the Federal courts have juris-
ction regardless of the value of the matter in controversy.
ud. Code, Sec. 24, subd. 14 (U. S. C. Tit. 28, Sec. 41);
ich v. *Truax*, 219 Fed. 273, 283, aff'd 239 U. S. 33 (1915).)
The penalties imposed on complainants by the Statute
sult in denying them equal protection of the laws by de-
iving them of the right of free ingress into the State of
ashington and egress therefrom, as well as the right to
e for infringement of copyright in the Federal courts.
aul v. *Virginia*, 8 Wall. 168, 180; *Terral* v. *Burke Con-*
ruction Co., 257 U. S. 529, 532; *Harrison* v. *St. L. & San*
ancisco R. R., 232 U. S. 318, 328.)

In singling out for the condemnation of the Statute, one class of owners of intellectual property (namely owners of copyrighted musical compositions) and exempting all others engaged in exactly the same business the Statute denies equal protection of the laws. (*Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 562.)

The sole object of the Statute is to oppress and discriminate against these complainants in favor of their 528 licensees in the State of Washington. This is a proper subject of judicial inquiry. It results in denying equal protection. (*Dobbins* v. *Los Angeles,* 195 U. S. 223, 240; *McFarland* v. *American Sugar Co.*, 241 U. S. 79, 86.)

Question 3. Is there a substantial claim that the Statute violates Article I, Section 8, Clause 8 of the Constitution of the United States?

Article I, Sec. 8, Clause 8 of the Constitution provides that:

> "The Congress shall have power: * * * To promote the progress of science and useful arts, by securing for limited times to authors and inventors the *exclusive right* to their respective writings and discoveries."

Congress has defined such exclusive rights by granting to the owner of a copyright in a musical composition the exclusive right:

> "(a) To print, reprint, publish, copy and read the copyrighted work * * *
>
> "(e) To perform the copyrighted work publicly for profit if it be a musical composition and * * * to make * * * any form of record in which the thought of an author may be recorded and from which it may be read or reproduced * * *" (Act of Mar. 4, 1909, 17 U. S. C., § 1).

The complainants, upon securing their respective copyights were granted *exclusive* rights which even the United States may not invade. (*United States* v. *Dubilier Conenser Corp.*, 289 U. S. 178, 186, 189; *James* v. *Campbell*, 104 . S. 356, 358; *United States* v. *Bell Telephone Co.*, 167 . S. 224, 249-50.)

A fortiori, the State of Washington may not invade these xclusive rights in the manner attempted by the State tatute.

Among the exclusive rights granted to copyright owners s the right of public performance for profit which includes erformances by live musicians in hotels, restaurants and ight clubs (*Herbert* v. *Shanley*, 242 U. S. 591), performnces by means of radio broadcasting or re-broadcasting *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191), and by neans of a radio receiving set installed in each room of a otel operated from a master-controlled set (*Society of European S. A. and C., Inc.* v. *New York Statler Hotel, Inc.*, 9 F. Supp. 1 [1937, S. D. N. Y.]).

The State Statute deprives copyright owners of the right o license the re-broadcasting of their works as well as the ublic performance of their works by means of radio-receivng sets, thus setting at naught rights granted by the Conress under the United States Copyright Law and Federal onstitution.

This is accomplished by the last proviso of Section 3 of he Statute which prevents copyright owners from restrictng the use of their works after a license for a public perormance has once been given within or without the State.

It is well settled, that copyright owners cannot be comelled to grant licenses except upon their own terms and at rices fixed by such owners. (*F. A. D. Andrea, Inc.*, v. *Radio Corp. of America*, 88 F. (2d) 474, aff'g 14 F. Supp. 26 (C. C. A. 3.)

The several States may not pass laws to the contrary. (*Henry Bill Pub. Co.* v. *Smythe*, 27 Fed. 914, 917 (S. D. Ohio).)

The State Statute ignores the very foundations of the Copyright Law by requiring the following:

(a) Requiring licenses to be issued on a so-called "per piece system of usage" (Section 3);

(b) Loss of the right to restrict the use of their copyrighted works after the right to a single use has been sold (Section 3);

(c) Filing a list of prices for all complainants' copyrighted works resulting in the granting of involuntary licenses to all users in the State of Washington (Section 4);

(d) Compelling complainants to submit to prices fixed by a so-called Anti-Monopoly Board or having all their copyrights confiscated if the prices charged by complainants are greater than those charged in any other State by any group of copyright owners (Sections 3 and 9);

(e) Compelling complainants to refrain from notifying infringers of their disregard of the Copyright Act, threatening to sue and suing for infringement in the Federal courts (Section 7);

(f) Compelling complainants to refrain from employing investigators to detect infringement and from licensing broadcasts in other States except at the risk of having all their copyrights regarded as having a *situs* in the State of Washington and being compelled to submit to the jurisdiction of the Washington courts and having their contracts ultimately escheated to such State (Sections 8 and 9);

(g) Requiring complainants to waive the right to challenge the jurisdiction of the Washington State courts over their persons (Sections 8, 9 and 10);

(h) Compelling complainants to surrender all their rights under existing contracts with users in the State of Washington by making it a crime to collect monies due thereunder (Sections 8, 9 and 11).

Unless complainants are willing to surrender all these rights, they are denied the privilege of enjoying the rights granted to them by the United States under their respective copyrights pursuant to the Constitution and the Acts of Congress thereunder.

Question 4. Does the State Statute deprive complainants of their property without due process of law?

The State Statute so defines the phrase "doing business", as to subject complainants to the jurisdiction of the State courts even though they do not transact any business within the State, do not reside there, and have no agent within the State (Sections 7 and 8). These fictitious definitions of "doing business" are made the basis of jurisdiction *in personam* of complainants so that the State may confiscate their properties and subject them to the penalties and forfeitures of the Statute by reason of acts over which the State of Washington has no possible jurisdiction as a matter of law. (*Chipman Ltd.* v. *Jeffery Co.*, 251 U. S. 373, 379; *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727; *Minnesota M. Assn.* v. *Benn*, 261 U. S. 140, 145; *Old Wayne Life Ass.* v. *McDonough*, 204 U. S. 8; *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79, 87; *Bank of America* v. *Whitney Central Nat. Bank*, 261 U. S. 171; *Caledonian Coal Co.* v. *Baker*, 196 U. S. 432, 444.)

Investigation of copyright infringements within the State made *conclusive* evidence of "doing business" therein (Section 8). This ignores the fact that the *Federal* grant of a copyright is nullified unless the copyright-owner is permitted to investigate infringements. It would be just as

logical to assert that the transportation of merchandise across the borders of a State by an interstate carrier subjects the latter to the jurisdiction of the State courts as one doing business within the State.

Similar fictions are employed in attributing a Washington *situs* to complainants' copyrights regardless of complainants' domicile and residence if complainants shall in any way violate the Statute, or if their copyrighted works are used or sold for public performance *outside* the State, if intended to be heard within the State from a point outside the State. It is well known that all radio programs from adjoining States, and even from distant States and from Canada, and on short-wave from foreign countries are intended to be heard within the State of Washington.

The excuse for giving such copyrights a Washington *situs* is indeed thin and transparent. It is an attempt to render the enjoyment of a Federal right impossible by arbitrarily creating a fictitious legal *situs* incompatible with the existence of the right. (*Harrison* v. *St. Louis & San Francisco R. R.*, 232 U. S. 318, 331.)

The State Statute by creating these arbitrary conclusive presumptions and fictitious definitions, deprives complainants of the right to show that they are not in fact doing business in the State of Washington; that their copyrights actually have no *situs* in the State, and that they have not so acted as to give the courts of Washington any express or implied consent to adjudicate their property rights. In denying complainants a fair opportunity to establish the true facts, the Statute violates due process. (*Manley* v. *Georgia*, 279 U. S. 1, 6; *Heiner* v. *Donnan*, 285 U. S. 312, 328; *Morrison* v. *California*, 291 U. S. 82, 90.)

The indefiniteness of the Statute in view of its drastic penalties, likewise results in denying due process. (*Connally* v. *General Const. Co.*, 269 U. S. 385, 391, 393-5; *Cline* v. *Frink Dairy Co.*, 274 U. S. 455, 457; *United States* v. *Cohen*

Grocery Co., 255 U. S. 81; *A. B. Small Co.* v. *American Sugar Ref. Co.*, 267 U. S. 233.)

Question 5. Does the State Statute interfere with treaties between the United States and foreign countries respecting copyrights and with proclamations of the President of the United States recognizing the existence of certain reciprocal conditions between the United States and foreign countries in respect of copyrights?

Section 8 of the Copyright Law (35 Stat. L. 1075) provides as follows as to recognition of copyrights by citizens and subjects of foreign States:

> "(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this Act or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.
>
> "The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this Act may require."

Pursuant to this provision a number of treaties have been entered into between the United States and foreign countries and there have been 62 Presidential proclamations establishing reciprocity between the United States and foreign countries.

Such reciprocity has been established on the basis of copyright laws as enacted by Congress. If each of the States may modify those laws the basis upon which these

treaties have been entered into and the proclamations issued will be entirely destroyed.

The Society has reciprocal agreements with similar societies existing in practically every civilized foreign country of the world. These agreements are made pursuant to the treaties and proclamations mentioned above. Since the State Statute nullifies these contracts it interferes with rights protected by treaties which are the supreme law of the land.

(h) The Abuse of Discretion in Denying the Interlocutory Injunction.

The special statutory district court in denying the interlocutory injunction abused its discretion in refusing to consider complainants' application on its merits and in refusing to permit complainants to offer testimony in open court or by depositions in support of the jurisdictional allegations.

THOMAS G. HAIGHT,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
H. W. HAUGLAND,
Counsel for Complainants.

APPENDIX "A".

In the House. By Mr. Keith.

HOUSE BILL NO. 480.

STATE OF WASHINGTON, TWENTY-FIFTH REGULAR SESSION.

Read first time February 11, 1937, ordered printed and referred to Judiciary Committee.

AN ACT

In aid of the Federal Copyright Laws, to assist in effectuating their true intent and their enforcement in the State of Washington by removing and declaring illegal certain monopolistic abuses and activities wrongfully practiced under the guise of copyrights within the state by price fixing combinations, monopolies, and pools; to enforce the Washington constitutional provisions prohibiting price fixing monopolies and combinations in restraint of commerce and trade; providing penalties for combining rights granted by the copyright laws where the effect of such combination results in the use of copyright privileges as instrumentalities of oppression and extortion within the state in violation of constitutional provisions, and encouraging the rendition, creation and production of copyrighted works among the school children and citizens of the State of Washington; encouraging the marketing and acceptance of copyrighted works, created by the citizens of this state; repealing certain acts; creating a State Anti-Monopoly Board for a particular function to be exercised only in the event of abuses and violations hereof; defining its duties, and the jurisdiction and duties of courts of record, the duties of the prosecuting attorneys, county auditors, the state treasurer and the secretary of state; and providing for the appointment of a receiver in certain instances; defining certain terms; providing for service of process on non-residents; prohibiting certain acts; and providing penalties for violation hereof and repealing section 2690 of Remington's Revised Statutes.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. Section 2690 of Remington's Revised Statutes is hereby repealed.

SEC. 2. It shall be unlawful for any person who, without the consent of the owner thereof, shall cause to be publicly performed for profit any dramatic composition, or dramatic musical composition commonly called an opera, or other copyrighted works, or any substantial part thereof, which has been copyrighted under the laws of the United States, or for any person to knowingly participate in the performance or representation of any substantial part thereof, or by knowingly selling a substantial copy of any substantial part thereof.

SEC. 3. It shall be unlawful for two or more persons holding or claiming separate copyrighted works under the copyright laws of the United States, either within or without the state, to band together, or to pool their interests for the purpose of fixing the prices on the use of said copyrighted works, or to pool their separate interests or to conspire, federate, or join together, for the purpose of collecting fees in this state, or to issue blanket licenses in this state, for the right to commercially use or perform publicly their separate copyrighted works: *Provided, however,* Such persons may join together if they issue licenses on rates assessed on a per piece system of usage: *Provided, further,* This act shall not apply to any one individual author or composer or copyright holder or owner who may demand any price or fee he or she may choose for the right to use or publicly perform his or her individual copyrighted work or works: *Provided, further,* Such per piece system of licensing must not be in excess of any per piece system in operation in other states where any group or persons affected by this act does business, and all groups and persons affected by this act, are prohibited from discriminating against the citizens of this state by charging higher and more inequitable rates per piece for music licenses in this state than in other states: *Provided further,* Where the owner, holder, or person having control of any copyrighted work has sold the right to the single use of said copyrighted work, where its sole value

is in its use for public performance for profit, and has received any consideration therefor, either within or without the state, then said person or persons shall be deemed to have sold and parted with the right to further restrict the use of said copyrighted work or works.

SEC. 4. In the event two or more persons holding separate copyrighted musical works, or any rights flowing therefrom, whether by assignment, agency agreements, or by any form of agreement, pool their interests, or combine, or conspire, federate, or join together in any way, whether for a lawful purpose or otherwise, a complete list of their copyrighted works or compositions shall be filed once each year in the office of the secretary of state of the State of Washington, together with a list of the prices charged or demanded for their various copyrighted works; no payment or filing fee shall be required by the secretary of state, and said persons, corporations, or association, foreign or domestic, shall state therein under oath, that said list is a complete catalogue of the titles of their claimed compositions, whether musical or dramatic or of any other classification, and in addition to stating the name and title of the copyrighted work it shall recite therein the date each separate work was copyrighted, and the name of the author, the date of its assignment, if any, or the date of the assignment of any interest therein, if any, and the name of the publisher, the name of the present owner, together with the addresses and residences of all parties who have at any time had any interest in such copyrighted work. The secretary of state shall require two copies of said list, one of which he shall keep on file, the other shall be forwarded to the offices of the state treasurer at Olympia.

SEC. 5. The foregoing list of names and titles, provided for in the preceding section, shall be made available by the secretary of state to all persons for examination, in order that any user of copyrighted works in this state may know the rights and the titles to such copyrighted works as may be claimed by any of said combinations, pools, associations, or persons as aforesaid; said lists shall be prepared so that all persons may avoid using said copyrighted compositions, if they so desire, and may avoid conflict therewith, and

avoid committing innocent infringements of said works; and in order to further effectuate the copyright laws of the United States, the secretary of state shall, if he deems it necessary to protect the citizens of this state from committing innocent violations of the copyright laws of the United States, publish such list once each year in a newspaper of general circulation, in order that all citizens of the state may respect any and all individual rights granted by the United States copyright laws.

SEC. 6. No person, corporation, or association, domestic or foreign, whether doing business in this state as hereinafter defined or not, shall be absolved from the foregoing duty of filing said list of holdings as required in the preceding sections of this act, if their music or copyrighted works are used commercially in this state, or have been used herein, whether originating from a point within the state or from without, and as long as any rendition thereof is received or heard within the state, or is intended to be so received by the originator of any musical program: *Provided, however,* Any individual owner of a copyrighted work or works, not a party to or not connected in any way with any pool, conspiracy, combination, or groups, or association of persons, as prohibited by this act, need not file any such list.

SEC. 7. It is hereby declared that the production and creation of music and the commercial use of music and of copyrighted works within this state, whether originating at a point from within or without the state, as long as the same shall be rendered and publicly received within the confines of this state, whether mechanically or by radio communication, is a business clothed and affected with the public interest, and the adult educational advantages engendered by the public use of music and in its creation, makes this business one of public necessity, and necessary for the education and training of the youth of this state; that many abuses are practiced under a false guise of federal protection which only the state with its police power can easily and lawfully restrain, and in order to prohibit, discourage, and prevent monopolistic practices, and to prevent extortion, to encourage free bargaining between the citizens of

this state with each other and with those without the state, and in order to give greater effect to the constitutional provisions relating to monopoly and price-fixing, and in the general interest of the public, therefore, the legislature in the interest of the peace and dignity of the state, in the interest of good morals and the general welfare of the people of this state, and for greater educational advantages to the public, declares that said business shall be subject to the police power and reasonable regulation of the state government, and such police and regulating power shall be administered by the courts and other officials of this state in a manner consistent with, in aid of, and never in conflict with, the copyright laws of the United States. The provisions of this act, and the administration thereof, shall at all times effectuate the enforcement, the true intent, and meaning of the United States copyright laws in order to prevent abuses from being practiced within this state from points within or from points without the state, by any individual, corporation, or organizations, who attempt to use the federal courts as innocent instrumentalities in the furtherance of any systematic campaign or scheme designed to illegally fix prices for the commercial use of copyrighted works in this state through the use of extortionate means and terrorizing practices based on threats of suits, and an abuse of both state and federal process, all of which are declared to be in violation of this act and of the state constitution; it is further declared that any person or persons, or combines, as aforesaid, who shall violate this act shall be deemed to have used their property within this state in such a way that the same shall have acquired a legal situs, analogous to the situs of other personal tangible property within the state, even though separate from the domicile and residence of the owner: *Provided, further*, The legal situs of any copyrighted work is co-extensive about the state, and a copyrighted work used or sold for public use or public performance for profit, if intended to be heard from a point without the state or from a point within the state, is hereby declared to be a commercial commodity, and its legal situs is hereby declared to be within the State of Washington.

SEC. 8. All persons, groups, corporations, associations, foreign or domestic, violating this chapter, shall be deemed

to have been doing business within this state and amenable to the process of the state courts, when any such persons, combinations, or groups shall have issued licenses, either from within or from without the state, for the privilege of using commercially and publicly any copyrighted work or works pooled in a common group or entity, or when any of the functions of said entity, organization, pool, or combine, is or has been performed in this state; and the business of spying upon and the warning of users of the copyrighted works of such combinations, in addition to the presence within the state of such persons, and the activities of such persons or their agents at any time or occasion for the detection of infringements within this state, shall be conclusive evidence that such combinations and persons, even though non-residents, have accepted the privileges of doing business within this state, and such persons, if they abide by the provisions of this act, shall be granted the privilege of conducting business within this state in a legal manner, and may invoke the benefits of the state government and its political subdivisions in their behalf, and they may use all of the privileges available to the citizens of this state in general, and the use at any time of any general privilege available to any citizen of this state, by any of such agents, their attorneys, or representative, or investigator, or by any aider and abettor, or any non-resident person, group, entity, or combination as aforesaid, shall be deemed to be an acceptance of the provisions of this act: and all licensees of any violator of this act shall be deemed as aiders and abettors of said persons and subject to the provisions of this act unless they forthwith indicate their obedience herewith: and the acceptance of the general privileges of the State of Washington by any non-resident copyright holder or owner, or combination, defendant, or person, or organization of any kind, or entity, through an investigator, attorney, agent, representative, or through any aider and abettor as herein defined, and the acceptance by such persons of the rights, police protection, or of any general privilege conferred by the law of this state to any of its citizens, including the use of the roads and highways, or the privileges of any of its political subdivisions, as evidenced by their presence within the state at any time, shall be deemed

equivalent to and construed to be an appointment by such non-resident or non-residents, as the case may be, of the secretary of state of the State of Washington to be his or their true and lawful attorney upon whom may be served all summons and processes against him or them and growing out of a violation of this act, in which said non-resident may be involved, and said acceptance of the privileges of this state, as aforesaid, shall be a signification of his or their agreement that any summons or process against him or them which is so served shall be of the same legal force and validity as if served on him or them personally within the State of Washington. Service of such summons or process shall be made by leaving a copy thereof with a fee of two dollars ($2) with the secretary of the State of Washington, or in his office, and such service shall be sufficient and valid personal service upon any such non-resident defendant, copyright holder or owner, persons, or defendants, combination, entity, or organization, as aforesaid: *Provided,* That notice of such service and a copy of the summons of process shall be forthwith sent by registered mail requiring personal delivery, by the prosecutor bringing any action under this act, to any defendant at his last known address, and the defendants return receipt and the prosecutor's affidavit of compliance herewith are appended to the process and entered as a part of the return thereof: *Provided, further,* The court in which any action is brought may order such continuances as may be necessary to afford any non-resident defendant or groups, or entity, a reasonable opportunity to defend the action: *Provided, further,* The secretary of state shall keep a record of all such summons and process which shall show the day and time of service; and valid personal service shall thus be had on non-resident persons or individuals, entities, firms, or corporations violating this act.

SEC. 9. In the event any person, or groups of persons, or any combination or pool as aforesaid, whether a non-resident corporation, person, or an association, or domestic, refuse to abide by the provisions hereof, or attempt to evade or render ineffectual the true enforcement of any provision of this act, then the prosecuting attorney of any

county where complaint is made of any violation, shall institute injunction proceedings against said persons in the superior court, and valid personal service may be had upon any non-resident defendant as set forth in the preceding section; and the court shall enjoin all persons from violating the provisions of this act and the constitutional provisions prohibiting price fixing, monopolies, and combinations, and all copyrighted works and the public performance rights thereto when sold or used for profit are hereby declared to be a commercial commodity, and all persons, aiders and abettors, and agents, shall be enjoined by the court from aiding or furthering in any way a continuation of any violation of this act, either by the payment of money to said defendants or in any way; and if any defendant or defendants persist in defying the judgment of the court, the court shall, in order to effectuate its judgment and orders, order three (3) days' notice be given said defendant or defendants, as the case may be, by having a copy of such notice served on the secretary of state as heretofore provided if defendants are without the state, or served personally if within the state, and have the same published in some daily paper in the state of general circulation, and at the end of said period, if any defendant or defendants refuse to obey the order of the court, then the court shall appoint the county auditor as receiver for the copyrighted works and property of defendants, tangible or intangible, and of all other effects and monies derived therefrom, and the receiver shall take over and preserve the commercial rights to all of said copyrighted works, together with such other property of any defendant, combination, pool, corporation, or entity through which they are acting, that he can locate within the state, and the receiver shall administer the same under the direction of the court, and said receivership shall be considered only as an incident to the main injunction suit of the prosecutor, and for the purpose of enforcing the courts orders; the said receiver shall seize the copyrighted works of all of the copyright holders and owners in said defendant combination, including all of the rights to suits for infringement and damages in both state and federal courts, and all choses of action and all sums due on contracts and

enses, and hold the same subject to the order of the court; d all persons holding licenses or contracts with any de- ndant combination or entity, shall pay the fees and sums e thereon to the receiver for such time as the court may ed to effectuate the provisions of this act, and to compel y defendant to abide herewith: *Provided*, Any sums paid licenses violating this act shall only be continued in the urts discretion or until such time as the court can award fendants complete and full due process of law before tering a final order thereon, or until such time as a legal d equitable system of licensing can be determined accord- g to the subsequent provisions of this act: *Provided rther*, In the event any defendant or defendants attempt withdraw their said copyright works or property from e state in order to violate and render this act or the courts ders ineffectual, or to deprive the citizens of this state such commodity, or to hamper the enforcement of any pro- sion of this act, or to injure any citizen or user of music in y way, then the court shall immediately order the receiver compile a complete list of all of the copyrighted works of id defendants to show cause within ten days why they urt shall then convene the State Anti-Monopoly Board, as rein now created, consisting of the state treasurer and the ate auditor, and said board shall meet in the county where e suit is filed, and the superior judge hearing the cause all be an advisory member of said board; and said ard, of which the state treasurer shall be chairman, all have only one function, the discouragement of price- ing and monopolies, and the court shall then submit to id board the single question of the establishment of license tes for the use of those copyrighted works controlled by e defendants so proceeded against; and for the purpose aiding in the abolition of monopolies and price-fixing, d preventing violations of this act, the board shall deter- ne a fair and just rate that the receiver should charge r the single and separate public performance for profit each copyrighted work or works of said defendants, on a r piece system and basis of licensing, and the court shall t be deemed thereby to have divested itself of any of its risdiction by so doing; after determining such rate, the

said Anti-Monopoly Board shall immediately advise the receiver of its findings, and of its fair rate, and the same shall be filed of record in the cause, and the receiver may then, if said finding is approved by the court, issue licenses for the use of said music at such approved rate on a basis of so much money per each time a piece of music is played or used in a public performance for profit; that said property shall be thus administered by the receiver for a period of one year, or until such time as the defendants, or the individual copyright owners of any combination so proceeded against take oath that they will abide by the ruling of the court and the provisions of this act; and all fees and funds collected by the receiver shall be turned over to the state treasurer, and no receivers fees or attorneys fees shall be allowed, and the prosecuting attorney shall be the attorney for the receiver, and the state treasurer shall keep said money in a separate and special fund, subject to the order of the court only for whatever portion thereof that the court may order used to defray the actual expenses of the board and the receivership; at the end of one year, if the defendants and copyright owners or holders in any combination thus proceeded against, continue to wilfully disobey the courts orders, then the court shall issue an order, which shall be published in three public places, to the effect that unless the defendants obey all of the orders of the court within ten days from the date of said order, that the court will proceed to permanently deprive said defendants and each of them of their property; and the court shall then order said defendants to show cause within ten days why they should not be involuntarily compelled to assign all of their copyrighted works to the receiver forthwith, and to show cause why all of the funds as collected in the manner aforesaid from licenses, together with all of the copyrighted works including the performing rights thereto of said defendants and members of said combine, should not escheat and be forfeited forever to the State of Washington, and be subject thereafter to administration by the state in the same manner as all other personal property belonging to the State of Washington; if any of said defendants and copyright holders, or owners, do appear before the end of said ten

day period, and take oath that they will abide by the future orders of the court and the provisions of this act, then the court shall release their copyrighted works and order the state treasurer to return any and all of their money which has been received or seized: *Provided, however,* The court shall retain such jurisdiction over their persons for such time as the court may deem necessary to insure strict compliance with the terms of the courts judgment and the provisions of this act; if any of said defendants or copyright owners or holders shall ignore or refuse to obey the show cause order, aforesaid, or fail to appear at the end of ten days as ordered and abide by the courts judgment, then the court shall make an order and enter judgment to the effect that all of the copyrighted works, including the performing rights thereto, of said defendants and the members of any defendant combination, shall be construed as having been escheated and forfeited to the State of Washington, and the court shall thereupon appoint some officer of the court to execute an involuntary assignment of all the legal and equitable titles to all of the copyrighted works of each of said defendants and members of any defendant combination to the receiver, in the event the defendants or any of their members fail to execute a voluntary assignment, and the receiver shall immediately file said involuntary assignment at the United States Copyright Office at Washington, D. C.; and the court shall then order the receiver to close the estate, and turn the titles to said copyrighted works over by proper assignment from the receiver to the state treasurer of the State of Washington, who shall thereafter administer, issue licenses for the use of the same in a manner consistent with this act, and conserve the same as state personal property in his possession, and according to law; and any funds left in the state treasury from said receivership shall escheat and be forfeited to the state and become part of the general fund; *Provided, further,* The state treasurer shall make a report to the legislature on each biennium of the amount of money received from such licensing and the amount of property he has on hand through the enforcement of this act.

SEC. 10. That in the event any person, or any of the defendants, or non-residents, or non-resident copyright owners or holders, are proceeded against as herein outlined, and are served with process according to law, or any non-resident is served with process as outlined in the preceding sections of this act, and if any of said defendants, or persons, or aidors and abettors named as defendants, appear in any such proceeding by counsel or otherwise, or institute any special proceeding attacking such proceeding, or make any motion therein, either special or general, or if any of them appear to obtain the judgment of the court solely upon the sufficiency of the service of the process upon them, or upon any phase or particularity of said injunction proceedings, such special proceeding or appearance, or motion, or appearance, as the case may be, shall nevertheless be deemed as a general appearanec even though the process may have been insufficient, and said parties and defendants as may thus appear in the action, for any reason or cause, whether they seek special or affirmative relief, shall thereafter be subject to the general orders and jurisdiction of the court for all purposes, and if any of said defendants or persons appear in any court proceeding instituted to effectuate this act solely for the purpose of challenging the validity of service of process upon them they shall be deemed to have surrendered themselves and as having submitted to the general jurisdiction of the court: *Provided, however,* This section shall not be construed as denying, and no attempt shall be made at any time in any proceeding in connection with the enforcement of this act, to restrain or deny any of said defendants, resident or non-resident, copyright holders or owners, or any person, or members of any defendant combination, entity, pool, or monopoly of their rights or property without full and complete due process of law.

SEC. 11. Every person, in addition to the other penalties provided in this act, who violates or who procures, or aids or abets in the violating of any provision of this act, or who conspires to render ineffectual any valid order or decision of any court in the enforcement of this act, or who pro-

fures, conspires with, or aids or abets any person or persons in his or their failure to obey the provisions of this act, or to render ineffectual any valid order of any court in connection with the enforcement of this act shall be deemed guilty of a gross misdemeanor, and upon conviction, shall be punished by a fine not exceeding five hundred dollars ($500), or imprisonment in the county jail for not more than six months, or both such fine and imprisonment.

SEC. 12. In case any part or portion of this act shall be held unconstitutional, such holding shall not affect the validity of this act as a whole or any other part or portion of this act, and if any clause, sentence, paragraph, subdivision, section or part of this act shall for any reason be adjudged invalid, such judgment shall not affect, impair, or invalidate the remainder of the act, but shall be strictly confined in its operation and holding to the specific clause, sentence, paragraph, subdivision, section, or part thereof, directly involved in the controversy in which such judgment shall have been rendered; and all other acts and laws in conflict herewith are hereby repealed.

SEC. 13. In the event more than one injunction suit provided for in this act is instituted in this state, in different counties by different prosecuting attorneys, but against the same defendants, the respective superior judges hearing the causes may issue orders against said defendants in any county, but in the event any of the various county proceedings enter into the stage of receivership, as herein provided, then the judges hearing the respective causes shall order those causes where the defendants are the same, to be consolidated in one action in one particular county, and in such county as the judges may decide, to the end that only one receiver may be appointed for the entire state for the property of the same defendant or defendants.

EXHIBIT "B".

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

IN EQUITY No. 606.

GENE BUCK, Individually and as President of The American Society of Composers, Authors and Publishers, CARL FISCHER, INC., G. SCHIRMER, INC., IRVING BERLIN, INC., DEEMS TAYLOR, OLEY SPEAKS, WILLIAM J. HILL, ANNE PAUL NEVIN, ELLA HERBERT BARTLETT and JANE SOUSA, *Complainants*,

vs.

OTTO CASE, as State Treasurer of Washington; CLIFF YELLE, as State Auditor of Washington; ERNEST N. HUTCHINSON, as Secretary of the State of Washington; G. W. HAMILTON, as Attorney General for the State of Washington; B. GRAY WARNER, as District Attorney of King County of Washington; HARRY H. JOHNSTON, as District Attorney of Pierce County of Washington; RALPH E. FOLEY, as District Attorney of Spokane County of Washington; A. W. SWANSON, as District Attorney of Snohomish County of Washington; H. W. COVALT, as District Attorney of Whatcom County of Washington; SMITH TROY, as District Attorney of Thurston County of Washington; PAUL O. MANLEY, as District Attorney of Grays Harbor, County of Washington; JOHN D. EVANS, as District Attorney of Yakima County of Washington GLENN L. BEAN, as District Attorney of Walla Walla County of Washington; SAM M. DRIVER, as District Attorney of Chelan County of Washington; "JOHN DOE" and "RICHARD ROE", *Defendants*,

K. M. O., INC., a corporation, *Intervening Defendant*,

JOHN G. LOCKHART, *Intervening Defendant*.

Memorandum Decision Upon Complainants' Application for Interlocutory Injunction and Defendants' and Intervening Defendants' Motions to Dismiss.

Filed May 9, 1938.

Vanderveer & Bassett, 1311 Alaska Bldg., Seattle, Wn., Attorneys for Complainants. Louis D. Frohlich, Herman Finkelstein, H. W. Haughland, of Counsel for Complainants,

G. W. Hamilton, Att'y General, State of Washington, E. B. Donnelly, Asst. Att'y General, State of Wash., B. Gray Warner, Dist. Att'y, King County, Washington, Edwin C. Ewing, Asst. Dist. Att'y, King County, Wash., Harry H. Johnston, Dist. Att'y, Pierce County, Wash., Ralph E. Foley, Dist. Att'y, Spokane County, Wash., A. W. Swanson, Dist. Att'y, Snohomish County, Wash., H. W. Covalt, Dist. Att'y, Whatcom County, Wash., Smith Troy, Dist. Att'y, Thurston County, Wash., Paul O. Manley, Dist. Att'y, Gray's Harbor County, Wash., Robert J. Willis, Dist. Att'y, Yakima County, Wash., Glenn L. Bean, Dist. Att'y, Walla Walla County, Wash., C. C. Dill, Hutton Bldg., Spokane, Wash., Special Att'y for Ralph E. Foley, Dist Att'y Spokane County, Washington,

Alfred J. Schweppe and McMicken, Rupp & Schweppe, Colman Bldg., Seattle, Wash., Solicitors and Attorneys for Defendants,

Kenneth C. Davis, % KOL, Seattle, Washington, Clarence C. Dill, Hutton Bldg., Spokane, Washington, Leo Teats, 301 Fidelity Bldg., Tacoma, Washington, Attorneys for Intervening Defendant, K. M. O. Inc., a corporation,

Clark R. Belknap, 512 Hoge Bldg., Seattle, Washington, Solicitor for John G. Lockhart, Intervening Defendant.

Before Haney, Circuit Judge and Cushman and Bowen, District Judges.

The suit is one heard by three judges pursuant to Section 266 of the Judicial Code (Title 28, U. S. C. A., § 380).

Complainants, suing on behalf of themselves and, stating that the questions involved are of common and general interest to all members of the complainant Society, allege that they sue on behalf of others similarly situated.

The Bill of Complaint alleges:

* * * * * * *

"1. The complainant, American Society of Composers, Authors and Publishers (hereinafter referred to, for brevity's sake, as the 'Society'), at all times hereinafter mentioned, was and still is an unincorporated association duly

organized and existing under the laws of the State of New York, and has its principal place of business, in the Borough of Manhattan, City of New York, in the State of New York, in the Southern District of New York. The membership of the Society exceeds 1,000, and is comprised of authors, composers and publishers of musical works; said Society was organized and has been issuing licenses for the public performance for profit of musical compositions copyrighted by its members to users located throughout the United States, including the State of Washington, and said Society has protected the performing rights of musical works copyrighted by said members respectively, against infringement because of the public performance thereof for profit, and continues so to do."

* * * * * * *

The complainant corporations are corporations of the State of New York engaged in the business of publishing musical compositions.

The complainant individuals are citizens of the State of New York and Maine and are either authors or composers of musical compositions, or their surviving relatives.

The defendants are either officers of the State of Washington or prosecuting attorneys of counties of that State alleged to be charged with the duty of enforcing the Act alleged to violate the Constitution of the United States—Chapter 218 of the Laws of 1937 of the State of Washington (Washington Session Laws, 1937, p. 1070) entitled:

"An Act in aid of the Federal Copyright Laws, to assist in effectuating their true intent and their enforcement in the State of Washington by removing and declaring illegal certain monopolistic abuses and activities wrongfully practiced under the guise of copyrights within the state by price fixing combinations, monopolies, and pools; to enforce the Washington constitutional provisions prohibiting price fixing monopolies and combinations in restraint of commerce and trade; providing penalties for combining rights granted by the copyright laws where the effect of such combination results in the use of copyright privileges as instrumentalities of oppression and extortion within the state in violation

of constitutional provisions; and encouraging the rendition, creation and production of copyrighted works among the school children and citizens of the State of Washington; encouraging the marketing and acceptance of copyrighted works, created by the citizens of this state; repealing certain acts; creating a State Anti-Monopoly Board for a particular function to be exercised only in the event of abuses and violations hereof; defining its duties, and the jurisdiction and duties of courts of record, the duties of the prosecuting attorneys, county auditors, the state treasurer and the secretary of state; and providing for the appointment of a receiver in certain instances; defining certain terms; providing for service of process on nonresidents; prohibiting certain acts; and providing penalties for violation hereof and repealing section 2690 of Remington's Revised Statutes."

The following summary of the Act complainants ask to have declared violative of the Constitution of the United States is sufficient for the purposes of this decision.

Section 2 makes it unlawful for any person, without the consent of the owner of any copyrighted work, to cause it, or any substantial part thereof, to be publicly performed for profit in the State of Washington.

Section 3 forbids two or more persons claiming separate copyrighted works to pool their interests for the purpose of fixing prices on their use or to join together for the purpose of collecting fees or to issue blanket licenses in the State of Washington for their commercial use. Provision is, however, made allowing the issuance of licenses on rates assessed on a per piece system of usage not to exceed those in effect in other States and that such enactment shall not apply to an individual copyright author or owner.

Section 4 provides that persons pooling their interests in copyrighted musical works shall file a list thereof once a year in the office of the Secretary of State of Washington, together with a list of prices charged therefor, no filing fee being required. Additional information including the titles, dates of copyright, name of the author, publisher and owner and the addresses and residences of those

who have at any time had an interest in such copyrighted work, is required to be set forth therein.

Section 5 makes available to all persons for examination such lists and authorizes the Secretary of State to publish the same.

Section 6 makes mandatory the filing of such list if the copyrighted works are used commercially in the State whether originating from a point within or without its confines, providing, however, the individual owner, if not connected with any pool, is exempted from this requirement.

Section 7 declares that the creation of music and its commercial use and of copyrighted works within the State, whether originating at a point within or without the State, if publicly received within its confines, is a business affected with a public interest subject to the State's police power and reasonable regulation, but never in conflict with the copyright laws of the United States. This section further provides that certain things done in violation of the act creates a presumption that such persons have used their property within the State, giving it therein legal situs; any copyrighted works used or sold for public performance for profit, intended to be heard from a point without or within the State, is declared to be a commercial commodity with a legal situs within the State.

Section 8 of the Act provides that associations violating such act shall be deemed to have been doing business within the State and amenable to the process of its courts; provides that certain described acts in connection therewith shall be conclusive evidence that such combinations, even though non-residents, have accepted the privilege of doing business within the State; that the "use" by an agent of a privilege afforded by the State shall be deemed an acceptance of the Act and construed as an appointment of the Secretary of State of Washington as the lawful attorney upon whom may be served summons and process growing out of a violation of the Act and signify agreement that such service of process is equal to personal service within the State. This section also directs the manner of the service of process upon the Secretary of State and its mailing, by registered mail requiring personal delivery.

Section 9 of the Act provides for injunctions issuing in a suit begun by the prosecuting attorney of any county upon such service as described in Section 8 and that the Court shall enjoin persons from violating the provisions of the Act and the Constitutional provisions prohibiting price fixing monopolies and combinations; that if defendants persist in defying the judgment of the court it shall appoint the county auditor as receiver of the copyrighted works and property of the defendants; that in the event defendants attempt to withdraw such copyrighted works or property from the State in order to violate and render the Act, and the court's orders, ineffectual, a board consisting of the State Treasurer and State Auditor, with the Superior Court Judge as an advisory member, shall fix a fair and just rate for the public performance for profit of each of the copyrighted works of the defendants upon a per piece system or basis of licensing.

Amounts realized by the receiver are to be placed in a special fund which, less expenses, after one year, together with all copyrighted works of defendants, becomes subject to forfeiture, after notice to defendants and hearing, if defendants continue to wilfully disobey the court's order.

Section 10 provides that the appearance, special or otherwise, of defendants served with process as outlined in preceding sections of the act, shall be deemed as a general appearance.

Section 11 provides that violation of the act is a gross misdemeanor subjecting to punishment by fine or imprisonment in the county jail.

Section 12 provides that if part of the act is held unconstitutional, such holding shall not affect the validity of any other portion of the act.

Section 13 concerns procedure in case injunction suits are instituted by prosecuting attorneys in different counties of the State and in case of a resulting receivership.

The Bill of Complaint alleges:

* * * * * * *

(Par. 8, page 10) "that the value of the copyrights owned by each" (complainant) "publisher is in excess of $1,000,000.00;"

* * * * * * *

(Par. 8, page 11) "that each of the publisher complainants would be compelled to expend a sum in excess of $25,000.00 for payment to investigators, lawyers, clerical help and other expenses, in an attempt to compile and formulate a list of their respective copyrights containing the data required by said State statute."

* * * * * * *

That the complainants Buck (Par. 10, Complaint), Taylor (Par. 11, Complaint), Speaks (Par. 12, Complaint) and Hill (Par. 13, Complaint) have created musical works which have been copyrighted and the right of each to collect royalties from his works, as well as his right to secure renewals, are worth in excess of $100,000.00.

* * * * * * *

(Par. 14, Complaint) "that the rights" (of complainants Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa) * * * are of great value and are worth in excess of $100,000.00, with respect to each of said complainants."

* * * * * * *

(Par. 18, Complaint) "at the present time there are approximately 123 publisher members of the Society; there are approximately 1000 writer and composer members of the Society; from time to time said publisher, writer and composer members have entered into contracts with the Society, wherein and whereby said members of the Society have assigned to the Society their respective exclusive right of public performance for profit in their respective musical compositions for periods of five years at a time;"

* * * * * * *

(Par. 21, Complaint) "The users of music have uniformly objected to dealing with individual copyright owners for the licensing of the public performance for profit of particular musical compositions; the practice of the Society has been to license theatres according to their seating capacity, radio broadcasting stations according to their

ıcome, power and coverage, and hotels, cabarets and dance alls according to the respective size, business done, numer and size of orchestras, methods of performance, income nd standing; licenses are granted by the Society to such sers in which all the musical compositions owned, written, nd composed by members of the Society are made available to such users for use at any time within the contract eriod without requiring the specific consent of the owner f the particular composition played; such licenses include kewise the right on the part of the users to publicly perorm for profit the musical compositions copyrighted, ritten and composed by members of societies throughout he world organized on a basis similar to the Society with hom Society has contracts so that by licenses made with he Society the users obtain the right to publicly perform or profit the works of over 44,000 composers, authors and ublishers; said rights granted by the Society are of great alue to the users who have consistently and uniformly bjected to the separate licensing of individual compositions, on the ground that it would involve a great amount f bookkeeping, clerical hire and expense; the system of lanket licenses conferred by the Society performs a useful ervice for the users and enables them to have available t all times for their own special purposes a vast reservoir f musical compositions that are pleasing and entertaining o the public, classical, modern, as well as popular; * * *

* * * * * * *

"that if the individual complainants were to create an gency within the State of Washington to protect against nfringement of their respective musical copyrights by unuthorized public performances for profit and to issue lienses thereunder to users in the State of Washington and heck up on the accuracy of uses reported, the cost thereof o each of such individual complainants would be greatly n excess of $10,000 a piece, which expenditure would be ecessary in the employment of investigators, clerical help, ccountants and lawyers."

* * * * * * *

(Par. 24, Complaint) "Upon information and belief, the Society pursuant to the rights vested in it by the contracts made with complainants herein, and others similarly situated, has for many years entered into numerous contracts which are now in force between it and users of music within the State of Washington, in which the Society has licensed such users to publicly perform for profit the musical compositions of its members; there are about 528 contracts in force at the present time from which the Society received for the year 1936 the sum of $60,530.68;"

* * * * * * *

(Par. 25, page 28, Complaint) "Under mutual working arrangements with foreign societies, the Society has the exclusive right to and does license within the United States, the public performance for profit of the musical compositions copyrighted by all the members of said respective foreign societies, and said foreign societies have the exclusive right to, and do license within the territorial limits of their respective countries, the public performance for profit of the musical compositions copyrighted by members of the Society. Under such arrangements between the Society and said foreign societies, the latter are not required to, and never have, filed lists of the respective works copyrighted by their respective members. The catalogues of musical compositions of said foreign societies exceed many hundreds of thousands of compositions composed and written by more than 44,000 members of such foreign societies, the exact number of compositions being utterly impossible to state at any one time on account of the expiration, renewal and obtaining of new copyrights. The right to perform the musical compositions embraced in said foreign catalogues is included in the blanket licenses issued to individual licensees by the Society in the United States. It is virtually impossible for the Society to obtain the information with respect to foreign copyrights required by Chapter 218 of the Laws of Washington, 1937, and the cost of even attempting to comply with that law would be far in excess of $50,000, and filing of monthly lists of changes would be wholly impracticable, because of expense, dis-

tance and the necessity of translations, together with the fact that no arrangements exist with foreign societies providing that such information be furnished. Their 44,000 members are scattered throughout the world, and they are not required to file a complete list of their works in order to enjoy copyright protection in the United States under the Treaties, Proclamations and United States Laws aforesaid."

(Paragraph 26, page 29) "Upon information and belief, compliance with said State Statute would require the Society and its licensees to abandon the contracts between them and would compel each of the complainants, as well as other members of the Society similarly situated to rescind their respective contracts with the Society unless they were willing to have their works used for purposes of public performance for profit in Washington on an arbitrary basis upon a per piece system; complainants and others similarly situated are not willing to permit their musical compositions to be performed within the State of Washington publicly for profit upon a per piece basis or on any basis wherein the fee or compensation would be arbitrarily determined by the State of Washington, or any of its agencies, or by anybody else; complainants believe that such price-fixing would deprive them of the exclusive rights vouchsafed to them under the copyright law; if each complainant would be required to act independently in order to have the right to fix license fees, each complainant would be required to have an investigator covering each of the places of public entertainment and amusement in the State of Washington to determine whether any infringements took place and to determine whether payments were being made in accordance with performances; the establishment of such an agency would cost each of the complainants many thousands of dollars and would in fact greatly exceed the revenue which each of them might hope to collect in the State of Washington; all the users in the State of Washington paid for the music of the 44,000 composers represented by the Society and its affiliated societies for the year 1936, the aggregate sum of $60,530.68. In the year 1936, the following counties of the State of Washington paid to the Society for licenses to publicly perform for profit musical compositions

of complainants and the other members of the Society and all other Societies throughout the world affiliated with the Society, the following sums:

County.	Amount Collected.
Benton	469.45
Callon	30.00
Chelan	701.00
Clallon	168.52
Clarke	316.13
Columbia	36.20
Cowlitz	62.20
Franklin	45.00
Garfield	40.00
Grand	22.50
Grays Harbor	1,265.68
Island	10.00
Kings	31,669.41
Kitsap	254.15
Kittatas	126.60
Klickitat	30.00
Lewis	443.70
Lincoln	15.00
Mason	62.50
Okanogan	123.25
Pend Oreille	49.80
Pierce	4,161.63
Skagit	37.50
Snohomish	661.77
Spokane	16,445.63
Thurston	384.02
Walla Walla	906.29
Wahkiakum	15.00
Whatcom	986.75
Whitman	258.90
Yakima	932.10
Making a Total of	$60,530.68

The proportion collected from each county represents the approximate proportions that were collected from each county for other years prior to 1936, and similar sums will

be collected in the same proportion in the future unless prevented by the operation of the said State Statute. The cost to the Society of attempting to compile the lists and information required to be furnished under the State Statute would be far in excess of $300,000, which sum would have to be expended for research work with reference to the past history of each and every copyright owner, by every one of the 44,000 members of the Society and its affiliated societies, lawyers fees for opinions as to the rights of parties, involved with respect to the ownership, grants, licenses and other interests in the respective copyrights, clerical help and other incidental expenses; even with such an expenditure, it would be utterly impossible to furnish an accurate or complete list of all the respective copyrights of the members of the Society and of its affiliated societies with all of the data required by the state statute."

* * * * * * *

(Paragraph 36, page 41, Complaint) "Each of the complainants has received from the Society for the year 1936, as compensation for the public performance for profit of the complainants' works, respectively, in excess of the following sums: Carl Fischer, Inc. in excess of $50,000.00; G. Schirmer, Inc. in excess of $50,000.00; Irving Berlin, Inc. in excess of $50,000.00; Gene Buck in excess of $5,000.00; Deems Taylor in excess of $5,000.00; Oley Speaks in excess of $5,000.00; William J. Hill in excess of $5,000.00; Anne Paul Nevin in excess of $5,000.00; Ella Herbert Bartlett in excess of $5,000.00; and Jane Sousa in excess of $5,000.00; upon information and belief, complainants will be entitled to receive for the balance of the period for which they have entered into contracts with the Society, and for which the Society has contracts with users of music, similar amounts for each year, down to December 31, 1939, and such complainants will receive such amounts for said period if their right thereto is not interfered with and destroyed by such State Statute; approximately two-thirds of the revenue obtained by the Society and distributed to the complainants and others similarly situated, is derived from moneys paid for the right to perform publicly for profit by means of radio broadcasting, and if this Court does not interfere and re-

strain the enforcement of such State Statute, such revenue may be lost to the Society and the complainants and others similarly situated will not participate in royalties from the public performance for profit by means of radio broadcasting, because such performances, even though given in other parts of the United States, may, under the provisions of such State Statute, be deemed a violation of such State Statute in the State of Washington, and licenses made outside of the State of Washington may result in forfeiture by the State of Washington of all complainants' copyrights, and complainants will lose the benefit of their said contracts with the Society and all the contracts made between the Society and users of music, and will receive no further moneys from public performance for profit by means of radio broadcasting of their musical compositions. * * * "

Except as to matters alleged upon information and belief, the verification of the Bill of Complaint by Gene Buck states that such complainant is fully familiar with the facts stated and avers them to be true.

Complainants, in part, pray that defendants:

* * * * * * *

"be enjoined and restrained by temporary and permanent order of injunction of this Court, from bringing, directly or indirectly, and from permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing said Statute, Chapter 218 of the Laws of 1937 of the State of Washington, against the complainants and others similarly situated, representatives, employees, agents or any of them, including the Society, as and when said Statute goes into effect, and from taking any steps to create or act as an anti-monopoly board, and from demanding a list of copyrights of musical works from complainants and others similarly situated, and from attempting to appoint or take any steps leading to the appointment of a receiver, and from attempting to seize, escheat or confiscate copyrights and choses in action of complainants and others similarly situated, and from attempting to fix any fees or grant licenses on a per piece system or otherwise on any of complainants' copyrighted musical works, and

from attempting to collect any license fees on the copyrighted musical works of complainants and others similarly situated, and from interfering with all existing contracts entered into between complainants and others, including the Society and citizens and residents of the State of Washington, and from threatening to enforce against any citizens or residents of the State of Washington, the penalties of said Statute in the event such citizens and residents desire to carry out their contracts with Society or complainants and others similarly situated, and from taking any steps to declare an involuntary assignment of the copyrights of complainants and others similarly situated, and from filing lists thereof with the Register of Copyrights in Washington, D. C., and from prosecuting criminally the complainants, their representatives or agents, or any of them, or others similarly situated, for doing any act or thing to detect infringement and to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Washington or elsewhere, and generally, from doing any act or thing to carry out or enforce any of the provisions of said State Statute as and when the same goes into effect; * * * "

* * * * * * *

Filed with the Bill of Complaint were affidavits of the complainant Gene Buck, Walter S. Fischer, President of complainant Carl Fischer, Inc., Saul H. Bornstein, Treasurer of complainant Irving Berlin, Inc., Gustave Schirmer, Secretary of complainant G. Schirmer, Inc., and the individual complainants Anne Paul Nevin, Deems Taylor and Ella Herbert Bartlett. These affidavits, in addition to stating the nature, extent and value of the affiants' copyright interests, contain allegations regarding the difficulty and expense of complying with the provisions of the State statute. These affidavits, while in certain respects more specific and detailed than the bill of complaint, insofar as the matter in controversy exceeding $3,000.00, exclusive of interest and costs, is concerned, offer nothing material in addition to the matter contained in the bill nor was there anything relevant upon this issue shown in the testimony taken upon the hearing.

This court was convened to hear the application of complainants for an interlocutory injunction. At the hearing of

such application, motions of the defendants and intervening defendants to dismiss were also heard. Among the grounds enumerated in Defendants' motion to dismiss are the following:

"I.

That this case does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, in that the amount or value of the subject matter in dispute does not exceed the sum of three thousand dollars ($3,000.00), exclusive of interest and costs, and that in this regard, it, among other things, more particularly appears:

1. That the individual complainants are exempt from the operation of the act (Section 3—See Exhibit 'E', Bill of Complaint, page 75).

2. That the complainants, American Society of Composers, Authors and Publishers, is 'a voluntary, unincorporated, non-profit corporation' (Bill of Complaint, page 19) and will suffer no loss in complying with the act.

3. That complainants cannot aggregate the amounts in controversy in order to secure the requisite jurisdictional amount.

4. That the act (Section 4—Bill of Complaint, page 75) does not require any filing or license fee to be paid by complainants, or any of them."

. . . . . .

IV.

. . . . . .

"3. That complainants have a plain, speedy and adequate remedy at law, in that

(a) Complainants can adequately interpose a defense to any criminal proceeding brought under the act (Section 11—Bill of Complaint, page 81), and such right of defense is an adequate remedy at law; and

(b) That complainants can adequately interpose their defense in any injunction suit brought by any prosecutor

under Section 9 of the act (Bill of Complaint, page 78), it being specifically provided in Section 10, Bill of Complaint, page 80, that no right of any person shall be affected in the state courts 'without full and complete due process of law'.

4. That defendants assert that they do not intend to enforce the criminal penalties of the act until the validity of the act is adjudged."

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Complainants cite: Buck v. Elm Lodge, 83 F. (2d) 201 (C. C. A. 2); Simkins, Federal Practice (1934), Sec. 468; Green County vs. Thomas' Exr., 211 U. S. 598; Collings vs. Guarantee Trust Co., 10 F. Supp. 462; McNutt v. General Motors Acceptance Corp., 298 U. S. 178; KVOS, Inc. vs. Associated Press, 299 U. S. 269; State vs. Scollard, 126 Wash. 335; Connally vs. General Const. Co., 269 U. S. 385; Lawton vs. Steele, 152 U. S. 133, 136-137; Smith vs. Cahoon, 283 U. S. 553; Hartford S. B. I. & Ins. Co. vs. Harrison, 301 U. S. 459, 81 L. Ed. 857; Louis vs. Boynton, 53 Fed. (2d) 471; Nutt vs. Ellerbee, 56 Fed. (2d) 1058; U. S. v. Bell Telephone Co., 167 U. S. 224, 249; Stevens vs. Gladding, 17 How. 451; Stevens vs. Cady, 14 How. 528; Ager vs. Murray, 105 U. S. 126; U. S. vs. Dubiller Condenser Corp., 289 U. S. 178, 186; Frost Trucking Co. v. Railway Comm., 271 U. S. 583 at 591; Stephenson vs. Binford, 287 U. S. 251, 275; Minnesota Rate Cases, 230 U. S. 352; Addyston Pipe & Steel Co. vs. U. S., 175 U. S. 211 at 227; Brennan vs. Titusville, 153 U. S. 302; Western Union Telegraph Co. vs. James, 162 U. S. 650 at 655; Southern Ry. Co. vs. Ry. Comm. of Ind., 236 U. S. 439; Prigg vs. Com. of Pa., 16 Pet. 539, 617; State ex rel. Foss Co. vs. Kelly, 186 Wash. 589; Van Dusen vs. Dept. of Labor & Industries, 186 Wash. 589; Patterson vs. Kentucky, 97 U. S. 501; Allen vs. Riley, 203 U. S. 347; Woods vs. Carl, 203 U. S. 358; Carbice vs. Am. Patents Corp., 283 U. S. 27; Fox Film vs. Doyal, 286 U. S. 123; Straus vs. Am. Publ. Assn., 231 U. S. 222; State of Wash. vs. Am. Soc. C. A. & P., 13 F. Supp. 141; City of Des Moines vs. Des Moines City Ry., 214 U. S. 179; Speilman Motor Sales Co. vs. Dodge, 295 U. S. 89; Cincinnati vs. Traction Co., 245 U. S. 446; Henderson vs. Railroad Comm., 56 F. (2d) 218;

Defiance Water Co. v. Defiance, 191 U. S. 184; Ferris vs. Frohman, 223 U. S. 424; Georgetown vs. Alexandria Canal, 12 Pet. 91; Healy v. Ratta, 29[illegible] U. S. 263; Pierce vs. Society, 268 U. S. 510; Carter v. Carter Coal Co., 298 U. S. 238; James v. Campbell, 104 U. S. 356 (1881) 358; Lithograph Co. v. Sarony, 111 U. S. 53, 59 (1884); American Tobacco Co. v. Werckmeister, 207 U. S. 284, 291 (1907); Caliga v. Inter Ocean Newspaper, 215 U. S. 182, 188 (1909); Rubber Tire Wheel Co. v. Milwaukee Rubber Co., 154 Fed. 358, 361; Monongahela v. United States, 148 U. S. 312, 335; Story, Commentaries, Sec. 1152; 174th St. etc. Amusement Co. v. Maxwell, 169 N. Y. Supp. 895; Performing Rights Society, Ltd. v. Thompson, 34 T. L. R. 351; Performing Rights Soc. Ltd. v. Magistrates, 1922, S. C. 165; Performing Rights Soc. Ltd. v. London Theatre, L. R. (1924) A. C. 1; Buck v. Jewell-LaSalle, 283 U. S. 191; Society of European Stage Authors, Inc. v. N. Y. Statler Hotel, (S. D. N. Y., Apr. 30, 1937); M. Witmark & Sons v. Standard Music Roll Co., 221 Fed. 376, 379 (C. C. A. 3); Wheaton v. Peters, 8 Pet. (33 U. S. 591); Little v. Hall, 18 How. (59 U. S.) 165; Douglas v. Cunningham, 294 U. S. 207, 209 (1935); White-Smith Music Co. v. Appolo Co., 209 U. S. 1, 19; Globe Newspaper Co. v. Walker, 210 U. S. 356, 367; New Fiction Pub. Co. v. Star Co., 220 Fed. 994; Webb v. Powers, 2 Woodb. & M. 497, 29 Fed. Case No. 17,323; Napier v. Atlantic C. L. R. Co., 272 U. S. 605; N. P. Ry. Co. v. Cooney, Governor, 12 Fed. Supp. 73; Louisville & N. R. Co. vs. State, 76 So. (Ala.) 505; Erie R. Co. v. N. Y., 233 U. S. 671; N. P. Ry. Co. vs. Washington, 220 U. S. 370; So. Ry. Co. v. Railr. Com., 236 U. S. 434; New York C. R. Co. v. Winfield, 244 U. S. 148; Penn. R. Co. v. Pub. Service Commission, 250 U. S. 569; Panama R. R. Co. v. Johnson, 264 U. S. 375, 387; Southern Pacific Co. v. Jensen, 244 U. S. 207, 217; Coca Cola v. State, 225 S. W. 791; McCarthy v. White, 259 Fed. 364 (S. D. N. Y. 1919); Nutt v. National Institute Inc., 31 Fed. (2d) 236, 238 (1929 C. C. A. 2); Uproar Co. v. National Broadcasting Co., 8 Fed. Supp. 358, 362 (D. C. Mass. 1934) 81 Fed. (2d) 373; Walling v. Michigan, 116 U. S. 446, 454 (1886); Walton v. Missouri, 91 U. S. 275 (1875); Bethlehem Motors Co. v. Flynt, 256 U. S. 421 (1921); Cramling v. Ma. well, 52 Fed. (2d) 256

(W. D. N. Car.); Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511 (1935); Allgeyer v. Louisiana, 165 U. S. 578, 589; St. Louis Compress Co. v. Arkansas, 260 U. S. 346, 348; New York Life Ins. Co. v. Head, 234 U. S. 149, 161; Home Ins. Co. v. Dick, 281 U. S. 397, 407; Aetna Life Ins. Co. v. Duncan, 266 U. S. 389, 399; Rawleigh v. Harper, 173 Wash. 233; Klabzuba v. Southern Pac. Co., 33 F. (2d) 359; Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U. S. 143, 149; Harrison v. St. Louis & San Francisco R. R., 232 U. S. 318; Chipman, Ltd. v. Jeffrey Co., 251 U. S. 373, 379; Cooper Manufacturing Co. v. Ferguson, 113 U. S. 727; Minnesota Commercial Men's Assn., 261 U. S. 140; Old Wayne Life Association v. McDonough, 204 U. S. 8; Peoples's Tobacco Co. v. American Tobacco Co., 246 U. S. 79; Green v. Chicago & Quincy Ry., 205 U. S. 530, 532; Fruit Industries Ltd. v. Metro, 18 F. Supp. 489; Parsons-Willis Lumber Co. v. Stuart, (C. C. A. 5th, 1910); 182 Fed. 779; James Dickinson Farm Mortgage Co. v. Harry, 273 U. S. 119, 122; Caledonian Coal Co. v. Baker, 196 U. S. 432, 444; Bank of America v. Whitney Central National Bank, 261 U. S. 171; Manley v. Georgia, 279 U. S. 1, 6; Heiner v. Donnan, 285 U. S. 312, 318; Morrison v. California, 291 U. S. 82, 90; Cline v. Frink Dairy Co., 274 U. S. 455, 457; H. Earl Clack Co. v. Public Service Com., 94 Mont. 488, 501, 22 Pac. (2d) 1056; United States v. Cohen Grocery Co., 255 U. S. 81, 89; A. B. Small Company v. American Sugar Ref. Co., 267 U. S. 233, 239 and 240; Ex Parte Young, 209 U. S. 123, 147, 148; State v. Crawford, 74 Wash. 248; Connolly v. Union Sewer Pipe Co., 184 U. S. 540 (1902) 562; State v. Cudahy P. Co., 33 Mont. 179; Seattle v. Ford, 144 Wash. 107; Inmin v. Sandvig, 170 Wash. 112; Kaufman v. West, 133 Wash. 192; Corn v. Fort, (Tenn.) 95 S. W. (2d) 620 (1936); Aberdeen S. & L. Assn. v. Chase, 157 Wash. 351, 392; Burr v. Chase, 157 Wash. 393; Dobbins v. Los Angeles, 195 U. S. 223, 240; McFarland v. American Sugar Co., 241 U. S. 79, 86; Wrthen Co. v. Kavanaugh, 295 U. S. 56 (1935) 60, 62; Fisher v. Kittinger, 39 Wash. 174; Tyson v. Banton, 273 U. S. 418, 429 (1927) 430, 441; Wolff Co. v. Industrial Court, 262 U. S. 522; Adams v. Tanner, 244 U. S. 590; Kibnik v. McBride, 277 U. S. 350; New State Ice Co. v. Liebman, 285 U. S. 262; Paul v. Virginia, 8 Wall. 168; Terral v.

Burke Construction Co., 257 U. S. 529, 532; Missouri Pacific Ry. Co. v. Larabee, 234 U. S. 459; Williams v. Standard Oil Co., 278 U. S. 235, 243; Carter v. Carter Coal Co., 298 U. S. 238, 316; Railroad Board v. Alton R. Co., 295 U. S. 330, 362; Metro-Goldwyn-Mayer Distributing Corporation v. Lamb, D. C., New Mexico, 1933; United States v. Interstate Circuit, Inc., 20 F. Supp. 868; Bobbs-Merrill Co. v. Straus, 210 U. S. 339; United States v. General Electric Co., 272 U. S. 476 at 485; American Banana Co. v. United Fruit Co., 213 U. S. 347; Title 15, U. S. C. A., Sec. 11; Buck v. Harry R. Swanson, No. 562, Equity, U. S. District Court for the District of Nebraska, Lincoln Division; Henneford v. Northern Pacific Ry., 82 L. Ed. 443; Troy Bank v. Whitehead & Co., 222 U. S. 39 (1911); Local Union No. 497 v. Joplin & P. Ry. Co., 287 Fed. 473 (C. C. A. 8, 1923); Haynes v. Fraternal Aid Union, 34 F. (2d) 305; Shields v. Thomas, 17 How. 3 (1854); Rodd v. Heartt, 17 Wall. 354, 357 (1873).

Defendants cite: Simkins Federal Practice (1934) Sections 386, 395-9; Pennsylvania v. Williams, 294 U. S. 176; Gordon v. Washington, 295 U. S. 30; Woods v. First National Bank, 16 F. (2d) 856 (C. C. A. 9th); Judicial Code, Section 37, 28 U. S. C., Section 80; Simkins Federal Practice (1934), Sections 483, 446, 462; McNutt v. General Motors Acceptance Corp., 298 U. S. 178; Simkins Federal Practice (1934), Sections 439, 444, 487; Matthews v. Rogers, 284 U. S. 521, 524, 525; Pusey & J. Company v. Hanssen, 261 U. S. 491, 500; American Mutual Liability Insurance Company v. McDonough, 61 F. (2d) 558, certiorari denied, 288 U. S. 602; KVOS v. Associated Press, 299 U. S. 269, 57 S. Ct. 197; Simkins Federal Practice (1934), Sec. 652; Missouri P. R. Co. v. Norwood, 283 U. S. 249; Allen v. Riley, 203 U. S. 347; Patterson v. Kentucky, 97 U. S. 501; John Woods & Sons v. Carl, 203 U. S. 358; Ozan Lumber Co. v. Union Nat'l Bank, 207 U. S. 251; Carbide Corp. v. American Patents Corp., 283 U. S. 27, 33; foot-note; Fox Film Corp. v. Doyal, 286 U. S. 123; Straus v. American Publishers Ass'n., 231 U. S. 222; State v. A. S. C. A. P., 13 F. Supp. 141; Heald v. District of Columbia, 259 U. S. 114; Arizona Copper Co. v. Hammer, 250 U. S. 400; Walker v. Gish, 260 U. S. 447; Lehon v. Atlanta, 242 U. S. 53; Oliver Iron Mining Co. v. Lord, 262 U. S. 172; Simkins Federal Practice (1934), Sec.

458, p. 401, and cases cited; Dahnke-Walker Co. v. Bondurant, 257 U. S. 285, 289; Panama R. Co. v. Johnson, 289 Fed. 964, affirmed 264 U. S. 374; Blair v. United States, 250 U. S. 273, 279; Massachusetts v. Mellon, 262 U. S. 447, 488; Dewar v. Brooks, 16 F. Supp. 636, 638, 9; Healy v. Ratta, 292 U. S. 263; Hale v. Mann, 15 Fed. (2d) 1051, 1052; Wheless v. City of St. Louis, 180 U. S. 379 at 393; Eberhard, v. Northwestern Mutual Life Ins. Co., 241 Fed. 353; Chapter 34 of the Laws of 1909 of the State of New York, as amended by Chapter 915, Laws of 1930 and Chapter 609 of the Laws of 1932; Spielman Motor Sales Co. v. Dodge, 295 U. S. 678; Cincinnati v. Traction Co., 245 U. S. 446; Henderson v. Railroad Commission, 56 Fed (2d) 218; Des Moines v. Railway, 214 U. S. 179; Defiance Water Co. v. Defiance, 191 U. S. 184; Savannah v. Hilton, 51 S. E. 744; Columbia Building Co. v. Grange, 77 Fed. 798; Boise Artesian Water Co. v. Boise City, 213 U. S. 276; Texas Co. v. Grosjean, 16 Fed. Supp. 264; Cruickshank v. Bidwell, 176 U. S. 73; Indiana Mfg. Co. v. Koehne, 188 U. S. 681; Atlantic Pipe Line Co. v. State Tax Board, 12 F. Supp. 265; Western Union Telegraph Co. v. Georgia, 269 U. S. 67; Cavanaugh v. Looney, 248 U. S. 450; Pullman Co. v. Tamble, 173 Fed. 200; City of St. Augustine v. St. James Electric Co., 286 Fed. 474; Columbus Ry. etc. Co. v. City of Columbus, 253 Fed. 499; Associated Press v. Herrick, 13 F. Supp. 897; Union Sulphur Co. v. Reed, 249 Fed. 172; Argonaut Mining Co. v. McPike, 78 F. (2d) 584; Ryan v. Amazon Petroleum Corp., 71 F. (2d) 1; Davis v. Farnum Mfg. Co., 189 U. S. 207; Dartmouth Woolen Mills v. Myers, 16 F. Supp. 633; Amalgamated Oil Gas Corp. v. San Francisco, 263 Fed. 617; Securities Exchange Comm. v. Electric Bond and Share, 18 F. Supp. 131; Bristol-Myer Co. v. Tischauer, 18 F. Supp. 228; Fitts v. McGhee, 172 U. S. 516; Richmond Hosiery Mills v. Camp, 74 F. (2d) 200; McCormack Bros. Co. v. City of Tacoma, 201 Fed. 374; Clark v. Lindemann & Hoverson Co. 88 F. (2d) 59; Northport Power & Light Co. v. Hartley, 283 U. S. 568, 570; Simkins, Federal Practice (1934) Sec. 735; National Fire Ins. Co. vs. Thompson, 281 U. S. 331; Meccano, Ltd. v. John Wanamaker, 253 U. S. 136, 141; Chicago, Great Western Ry. vs. Kentall, 266 U. S. 94, 100; Rend vs. Ventura Oil Co., 48 Fed. 248; Spark vs. Hart Coal Corp.,

74 F. (2d) 697, 699; Jamestown Veneer & P. Corp. v. Boland, 15 F. Supp. 28; Sparks vs. Mellwood Dairy, 74 F. (2d) 695; Behre v. Anchor Ins. Co., 297 Fed. 986; Phoenix R. R. vs. Geary, 239 U. S. 277; Yarnell vs. Hillsborough P. Co., 70 F. (2d) 435; Article I, Section 8, Federal Constitution; Title 17, U. S. Code, Sections 42, and 44; New Fiction Publishing Company v. Star Company, 220 F. 994,; Article XII, Section 22, Constitution of the State of Washington; American Export Door Corp. v. Gauger, 154 Wash. 514; Kuhn v. Fairmont Coal Co., 215 U. S. 349; Simkins Federal Practice (1934), Sec. 337; Grant-Smith Porter Ship Co. v. Rohde, 25 U. S. 469; Millers Indemnity Co. v. Brand, 270 U. S. 59; Union Bank & Trust Co. v. Phelps, 288 U. S. 181; Carley & Hamilton v. Snook, 281 U. S. 66; Hart Refineries v. Harmon, 278 U. S. 499, 574; Smith v. Cahoon, 283 U. S. 553; State Board v. Jackson, 283 U. S. 527; Village of Euclid v. Ambler, 272 U. S. 365; Baldwin Case, 294 U. S. 511; Henneford v. Mason Co., 300 U. S. 577; Hyland Farms v. Agnew, 300 U. S. 608; Union Dry Goods Co. v. Georgia Public Service Corp., 248 U. S. 372; Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398, 434-5; Manigault v. Sprins, 199 U. S. 473, 480; Terral v. Burke Construction Co., 257 U. S. 529; Paul v. Virginia, 8 Wall. 168; Hooper v. California, 155 U. S. 648; Moore v. New York Cotton Exchange, 270 U. S. 593; Savage v. Jones, 225 U. S. 501; Continental Wallpaper Co. v. Voight & Sons, 212 U. S. 227; Ludeling v. Chaffe, 143 U. S. 301; Giles v. Little, 134 U. S. 645, 649; McCandless v. Pratt, 211 U. S. 437; Dahnke v. Walker Milling Co. v. Bondurant, 257 U. S. 282, 289; Hale v. Mann, 15 Fed. Supp. 1051; Pinel v. Pinel, 240 U. S. 594; Hart Coal Corporation v. Sparks, 9 F. Supp. 825; Clay v. Field, 138 U. S. 464, 479; Lion Bonding & Surety Company v. Karatz, 262 U. S. 77; Harvey v. Raleigh & G. R. Co. et al., 89 Fed. 115; Healy vs. Ratta, 292 U. S. 263.

Intervening Defendant KMO, Inc., cites: Pennsylvania v. Williams, 294 U. S. 176; Gordon v. Washington, 294 U. S. 30; Woods v. First National Bank, 16 F. (2d) 856; Grael v. United Electric Co., 132 Fed. 252, 265; Harley v. Fireman's Fund Insurance Co., 245 F. 471; Demer v. Pacific SS. Co., 273 Fed. 567, 577; Hansen v. Pacific Coast Cement

Co., 243 Fed. 285; Eddy v. Chicago & N. W. R. Co., 226 Fed. 120, 125; Ex Parte Poresky, 290 U. S. 30; Patterson v. Kentucky, 97 U. S. 501; Allen v. Riley, 203 U. S. 347; John Woods & Sons v. Carl, 203 U. S. 358; Ozan Lumber Co. v. Union County Nat'l Bank, 207 U. S. 251; Carbide Corp. v. American Patents Dev. Co., 283 U. S. 27, 33, footnote; Fox Film Corp. v. Doyal, 286 U. S. 123; Straus v. American Publish. Assn., 231 U. S. 222, 234-5; State v. A. S. C. A. P., 13 F. Supp. 141; Heald v. District of Columbia, 259 U. S. 114; Arizona Copper Co. v. Hammer, 250 U. S. 400; Walker v. Gish, 260 U. S. 447; Lehon v. Atlanta, 242 U. S. 53; Oliver Iron Mining Co. v. Lord, 262 U. S. 172; Panama R. Co. v. Johnson, 289 Fed. 964, affirmed, 264 U. S. 374; Yazoo & Miss. R. Co. v. Jackson Vinegar Co., 226 U. S. 217; Blair v. United States, 250 U. S. 273, 279; Massachusetts v. Mellon, 262 U. S. 447, 488; McNutt v. General Motors Acceptance Corp., 298 U. S. 178; KVOS v. Associated Press, Inc., 299 U. S. 269, 57 S. Ct. 197; Columbia Building and Loan v. Grange, 77 Fed. 798; Wheless v. City of St. Louis, 180 U. S. 379 at 383; Dewar v. Brooks, 16 F. Supp. 636; Scribner v. Straus, 210 U. S. 352; Spielman Motor Sales Co. v. Dodge, 295 U. S. 678; Cincinnati v. Traction Co., 245 U. S. 446; Henderson v. Railroad Commission, 56 Fed. (2d) 218; Savannah v. Hilton, 51 S. E. 744; Boise Artesian Water Co. v. Boise, 213 U. S. 276; Texas Co. v. Grosjean, 16 F. Supp. 264; Cruickshank v. Bidwell, 176 U. S. 73; Indiana Mfg. Co. v. Koehne, 188 U. S. 681; Atlantic Pipe Line Co. v. State Board, 12 Fed. Supp. 265; Western Union Telegraph Co. v. Georgia, 269 U. S. 67; Cavanaugh v. Looney, 248 U. S. 450; Pullman Co. v. Tamble, 173 Fed. 200; Columbus Ry. etc. Co. v. City of Columbus, 253 Fed. 499; Associated Press v. Herrick, 13 F. Supp. 897; Union Sulphur Co. v. Reed, 249 Fed. 172; Argonaut Mining Co. v. McPike, 78 F. (2d) 584; Ryan v. Amazon Petroleum Corp., 71 F. (2d) 1; Davis v. Farnum Mfg. Co., 189 U. S. 207; Dartmouth Woolen Mills v. Myers, 16 F. Supp. 633; Securities Exchange Comm. v. Electric Bond & Share, 18 F. Supp. 131; Bristol Myer Co. v. Tischauer, 18 F. Supp. 228; Fitts v. McGhee, 172 U. S. 516; Richmond Hosiery Mills v. Camp, 74 F. (2d)

200; McCormick Bros. Co. v. City of Tacoma, 201 Fed. 374; Clark v. Lindemann & Hoverson Co., 88 F. (2d) 59; Mathews v. Rodgers, 284 U. S. 521, 529, 530; Simkins Federal Practice (1934) Sec. 735; National Fire Ins. Co. v. Thompson, 281 U. S. 331; Rend v. Ventura Oil Co., 48 Fed. 248; Jamestown Veneer & P. Corp. v. Boland, 15 Fed. Supp. 28; Sparks v. Mellwood Dairy, 74 F. (2d) 695; Behre v. Anchor Ins. Co., 297 Fed. 986; Phoenix R. R. v. Geary, 239 U. S. 277; Yarnell vs. Hillsborough P. Co., 70 F. (2d) 435; American Society of Composers, Authors and Publishers vs. Elm Lodge, May 12, 1936, J. Bryant, District Court of New York; Caliga vs. Newspaper Co., 215 U. S. 188; United States v. Knight, 136 U. S. 1; U. S. National Bank v. Maine, 284 U. S. 331; Palmer v. Texas, 212 U. S. 119; Article XII, Sec. 22 of the Washington Constitution; Ager v. Murray, 105 U. S. 126; State v. Morey, 105 Pac. 501; National Harrow Co. v. Hendh, 83 Fed. 36; Maloney, Attorney General v. American Tobacco Co., 72 Fed. 801; Hoit vs. Bates, 81 Fed. 641; Carle Laemmle Music Co. vs. Stern, 209 Fed. 129; Murphy v. Johnson, 49 Fed. (2d) 410; Blytheville Ry. Co. vs. St. Louis San Francisco Ry. Co., 33 Fed. (2d) 481; Von Herberg vs. City of Seattle, 27 Fed. (2d) 457; Georgia Trust Co. vs. State of Georgia, 109 Ga. 766; 35, S. E. 323; 40 Corpus Juris 198; State vs. Racina, 63 Civ. Appeals 663, 134 S. W. 400; 41 Corpus Juris 127; Howard vs. Fleming, 191 U. S. 126; Ughbanks vs. Armstrong, 208 U. S. 481; Randall v. Brigham, 74 U. S. 523; In re Jordan, 49 Fed. 238; Germania Insurance Co. v. Wisconsin, 119 U. S. 473; Pullman Palace Car Company v. Speck, 113 U. S. 84; Schipper v. Consumer Cordage Co., 73 Fed. 803; Kansas City Railroad v. Daughtry, 138 U. S. 298; Associated Press v. National Labor Relations Board, 301 U. S. 103; West Coast Hotel Co. v. Parrish, 300 U. S. 379; Hobbie vs. Jennison, 149 U. S. 355, 13 Sup. Ct. Rep. 879; 37 L. Ed. 766; Adams v. Burke, 17 Wallace 453; Boesch v. Graff, 133 U. S. 697, 10 Sup. Ct. Rep. 378; Buck v. Jewell-Lasalle, 283 U. S. 191, 51 Sup. Ct. Rep. 412; Billiard Table Manufacturing Co. v. Tyler Bunk, 16 Fed. Supp. 990; Bass vs. State Tax Commission, 133 N. E. 122, 232 N. Y. 42;

Highland Farms Dairy v. Agnew, 300 U. S. 608; Henneford v. Silas Mason Co., 300 U. S. 577; New York ex rel Cohn v. Graves, 300 U. S. 308; Campbell vs. Haverhill, 155 U. S. 610, 39 L. Ed. 280; 15 Sup. Ct. 217; Maloney, Attorney General of Illinois vs. American Tobacco Co., 221 U. S. 106; McKenny vs. Kansas Natural Gas Co., 206 Fed. 772; Clark on Receivers, Vol. I, Sec. 243, p. 332; United States vs. Union Pacific Railway, 226 U. S. 98; Carpenter vs. Strange, 141 U. S. 87, 105; First National Bank vs. Maine, 284 U. S. 312; York vs. Texas, 137 U. S. 15, 11 Sup. Ct. 9; Kauffman vs. Wooters, 138 U. S. 285, 11 Sup. Ct. 298; State vs. Racine, 63 Texas Court of Appeals, 663, 134 S. W. 400; 41 Corpus Juris 127; Manners v. Morosco, 258 Fed. 357, affirmed 2522 U. S. 317; Drone on Copyright, p. 337; Hossak v. Ottawa Association, 91 N. E. 439; Brown v. Harris Medical Society, 194 S. W. 1179; Kelsey vs. Grain Elevator, 206 S. W. 849; Dale Tile Mfg. Co. vs. Hayatt, 125 U. S. 46; Witteman Bros. v. Witteman Co., 151 N. Y. S. 814; New Marshall Engine Co. vs. Marshall Co., 223 U. S. 473; Montgomery Palace Stock Car Co. v. Car Line, 43 Fed. 321; Hartell v. Tilchman, 99 U. S. 547; Albright v. Teas, 106 U. S. 613; Becker v. Contoure Laboratories, 29 Fed. (2d) 31; Bouvier's Law Dictionary, "Assignment", page 264, Vol. I; Title 28, U. S. C. A., Notes 221 to 260, pages 108 to 122; DeCroisset et al. v. Vitagraph Co., 262 Fed. 100; Tulley v. Triangle Film Corp., 229 Fed. 297; KVOS Inc. v. Associated Press, 299 U. S. 269; Decision of Judge Augustus Hand, filed February 27, 1922. in United States v. Consolidated Music Corporation, U. S. District Court for the Southern District of New York; Parson v. Chicago, 138 Fed. 184, 186; Chicago etc. R. R. Co. v. Wiggins, 108 U. S. 18, 1 S. Ct. 614, 27 L. Ed. 636; Boise Artesian Hot and Cold Water Co. v. Boise City, 213 U. S. 276, 53 L. Ed. 796; Rogers v. Mattnews, 284 U. S. 521, 76 L. Ed. 447; Title 28, U. S. C. A., Sec. 384; Spielman Motor Sales Co. Inc. v. Dodge, 295 U. S. 89, 76 L. Ed. 1322; Bradford v. Hurd, 84 Fed. (2d) 722; Cleveland Cliffs Iron Co. v. Kinney, 262 Fed. 980; Riggs v. Johnson, 6 Wall. 166, 18 L. Ed. 768; Phelps v. Mutual Reserve Fund Life Assoc., 190 U. S. 147, 23

S. Ct. 707, 47 L. Ed. 987; Fisk v. Union Pac. R. Co., Fed. Cas. No. 4827; Smyth v. Asphalt Belt Ry. Co., 267 U. S. 326; 45 S. Ct. 242, 69 L. Ed. 629; Northport Power and Light Company v. Hartley, 283 U. S. 568, 75 L. Ed. 1275; Heald vs. Dist. of Columbia, 259 U. S. 114; Arizona Copper Co. v. Hammer, 250 U. S. 400; United States v. Interstate Circuit, Inc., 20 F. Supp. 868; Buck vs. DeBaun, 40 Fed. (2d) 734; Legislative Bill No. 478, Fifty-Second Session, Legislature of Nebraska; Henneford v. Northern Pacific, Montgomery's Manual, P. 161; Risty v. Chicago, R. I. & P. Ry. Co., 297 Fed. 710-722; Chicago, R. I. & P. Ry. Co. v. Risty, 282 Fed. 364, cert. denied, 266 U. S. 622.

Intervening Defendant John J. Lockhart cites: Love v. Kozy Theatre, 236 S. W. 245; Continental Co. v. Voight, 212 U. S. 227; Title 15, U. S. C. A., Sec. 17; Fisher's Blend Station v. Washington Tax Commission, 297 U. S. 650; Straus v. American Book Publishers, 231 U. S. 231; National Harrow v. Hench, 83 Fed. 36; Goldwyn Pictures vs. Howells, 282 Fed. 9; Corpus Juris, Vol. 13, p. 1106; Photo-Drama et al. vs. Social Uplift Film Co., 213 Fed. 574; Witmark v. Pastime Theatre, 298 Fed. 470; New Fiction Pub. Co. v. Star Co., 220 Fed. 994; Bobbs-Merrill Co. v. Straus, 147 Fed. 15; Federal Baseball League vs. National League, 259 U. S. 200; Marienelia Limited v. United Booking Offices, 227 Fed. 165; United States v. Patten, 226 U. S. 543; Loewe v. Lawlor, 208 U. S. 274; Paramount v. United States, 282 U. S. 30; United States v. Northern Securities, 120 Fed. 721; Standard Oil vs. United States, 283 U. S. 163; Eastern States Retail Association v. United States, 243 U. S. 600; United States v. American Column Lumber Co., 263 Fed. 147, affirmed 257 U. S. 377; Northern Securities vs. United States, 193 U. S. 197; Addyston Pipe Co. vs. United States, 85 Fed. 291.

CUSHMAN, District Judge:

Section 266 of the Judicial Code (Title 28, U. S. C. A., § 380), in part, provides:

* * * * * * *

"It is further provided that if before the final hearing of such application a suit shall have been brought in a court

of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State."

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As already stated, the prayer of the Complaint, in part, is that defendants:

* * * * * * * *

"be enjoined and restrained by temporary and permanent order of injunction of this court, from bringing, directly or indirectly, and from permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing said Statute, Chapter 218 of the laws of 1937 of the State of Washington, against the complainants and others similarly situated, representatives, employees, agents or any of them, including the Society, as and when said Statute goes into effect. * * *"

By the foregoing it appears that a, if not the, major purpose of the Bill is to deprive the State courts of an opportunity to exercise the jurisdiction saved to them by the express terms of the Act under which this court was created and under which complainants ask it to enjoin defendants from bringing such authorized suits in a court of the State.

In view of the conclusion herein reached it will not be determined whether, under such circumstances, the court should attempt to spell out jurisdiction of other parts of this suit.

As already stated, each one of the defendants, in the motion to dismiss, state:

* * * * * * * *

"4. That defendants assert that they do not intend to enforce the criminal penalties of the act until the validity of the act is adjudged."

* * * * * * * *

The consideration of the effect of this disclaimer upon the jurisdiction of the Court as a court of equity (Spielman Motor Co. v. Dodge, 295 U. S. 89-96) should in any event be deferred until the court determines its jurisdiction as a district court.

The Bill must allege affirmatively and distinctly whatever is essential to the Court's jurisdiction, Smith v. McCullough, 270 U. S. 456-459; Norton v. Larney, 266 U. S. 511-515, and, if the allegations of the Bill as to jurisdictional facts are by the defendants challenged in an appropriate manner, complainants must support them "by competent proof", McNutt v. General Motors Acceptance Corp., 298 U. S. 178-189.

There is no question but that the motion of the defendants to dismiss, denying that the matter in controversy exceeds $3,000.00 exclusive of interest and costs, was sufficient at the hearing had to place upon complainants the burden of so establishing that it is in excess of such amount.

The Bill of Complaint alleges that Chapter 218 is unconstitutional:

* * * * * * *

"in that it deprives complainants of their liberty and property without due process of law and the equal protection of the laws, impairs the obligation of contract, destroys the rights of complainants in their copyrighted works, nullifies valid contracts theretofore entered into, interferes with the Federal judicial power, destroys the privileges and immunities granted to complainants, and attempts to subordinate the Federal Constitution and the Copyright Act to the State of Washington, and complainants to an unreasonable search and seizure of their properties, effects, papers and persons."

* * * * * * *

By the foregoing it is made to appear that complainants invoke the protection of the 14th Amendment, Article I, Section 8, Clause 8, Section 10, Clause 1, Article 3, Section 2, Clause 1, Article 4, Section 2 and Article 6, Clause 2 of the Constitution.

The suit, as made by the Bill, is one concerning a State legislative enactment affecting property in copyrights because of conduct of those owning and interested in them—conduct beyond and apart from rights granted by copyrights. The owner of a copyright, because of conduct prohibited by law, may lose it. The question is whether the conduct by this statute forbidden is within the police power of the State to proscribe.

It follows that the suit is one under the Fourteenth Amendment rather than one arising under the copyright laws of the United States and that the amount in controversy to give the court jurisdiction must be in excess of $3,000.00, exclusive of interest and costs.

The non-profit sharing complainant Society, on behalf of whose members it is claimed the Bill is filed, has not the requisite amount of pecuniary interest. KVOS, Inc. v. Associated Press, 299 U. S. 269-278. The transfer to the Society by the members of their rights for such of the total (less expense) realized from the pooled license fees as a committee of the Society shall determine does not affect the pecuniary interest of the Society.

Concerning the aggregating of the claims of the members of the complainant Society in determining the amount in controversy, neither practice nor rule of the committee concerning the apportioning among the Society's members of the pooled license fees realized is shown. It appears to be a part of the contention made by the defendants that such division is inequitable and to the advantage of those directly concerned with the management of the affairs of the Society. It also appears that such distribution may be of license fees secured throughout the country rather than from within the State. A common interest among the members warranting an aggregating of their claims for such purpose has not been shown.

Concerning the competency of the verified Bill and affidavits, Equity Rules 73 and 48 provide:

"Rule 73. Preliminary Injunctions and Temporary Restraining Orders.

No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party,

unless it shall clearly appear from the specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office."

"Rule 48. Testimony of Expert Witnesses in Patent and Trade Mark Cases.

In a case involving the validity of scope of a patent or trade-mark, the district court may, upon petition, order that the testimony in chief of expert witnesses, whose testimony is directed to matters of opinion, be set forth in affidavits and filed as follows: Those of the plaintiff within forty days after the cause is at issue; those of the defendant within twenty days after plaintiff's time has expired; and rebutting affidavits within fifteen days after the expiration of the time for filing original affidavits. Should the opposite party desire the production of any affiant for cross-examination, the court or judge shall, on motion, direct that said cross-examination and any re-examination take place before the court upon the trial, and unless the affiant is produced and submits to cross-examination in compliance with such direction, his affidavits shall not be used as evidence in the cause."

Rule 29 of the Rules of this—the District—Court, provides:

"Rule 29. Injunctions.

Proceedings for injunctions are governed by the practice in equity in the Federal Courts. No application for a preliminary injunction or restraining order will be entertained, by the Court or Judge, until after a bill in equity has been filed in the clerk's office and a subpoena issued thereon. No preliminary injunction shall be granted without notice to the opposite party; nor shall any temporary restraining order be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that irreparable injury will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on the earliest day that the business of the Court will admit of, and if practicable, not later than the succeeding law and motion day, which is to be held, and shall take precedence of all other matters on the calendar of said day, except older matters of the same character, and matters to which special precedence may be given by the order of the Court. When the matter first comes up for hearing the party who obtained the temporary restraining order shall be required to be ready to proceed with his application for a preliminary injunction, and if he be not ready the Court may dissolve his temporary restraining order. The defendant, however, shall be entitled as of course to one continuance for a reasonable period, if he desires it, to enable him to meet the application for the preliminary injunction. The defendant may, without notice, when the matter first comes up in court, or at any subsequent hearing, present affidavits relating to the continuance or modification of the temporary restraining order as distinct from the application for the injunction, and the restraining order may be dealt with separately in the discretion of the Court."

* * * * * * *

No temporary restraining order was granted in this cause. Rule 48, in effect, excepts the cases therein described from the general rule. Rule 73 and Rule 48 are both new rules promulgated since the adoption of Rule 29 of this Court. Rule 29 is not at variance with Rule 73. If it was, Rule 73 would of course control.

In view of the foregoing, it is clear that there is no competent evidence showing that the matter in controversy exceeds, exclusive of interest and costs, $3,000.00. See also Title 28, U. S. C. A., §§ 381, 639, 723 and 730.

The affidavits in support of the Bill may, upon such a hearing, be considered as preliminary pleadings for the purpose of determining what, if any, matters are in dispute, but they and the verified Bill are, if denied, incompetent as evidence.

If the competency of the allegations of the Bill and affidavits be assumed, they still fail to clearly and distinctly show that the jurisdictional amount is in controversy, for while the owners of copyrights may be assumed to have knowledge concerning the extent of their ownership, there can be no presumption that they are qualified to express an opinion concerning the cost of complying with the requirements of Section 4 of the Act, nor would the Court, without more, be warranted in accepting, without opportunity for cross-examination, the statement of an owner as to the value of his property unless it was a statement against interest.

As already shown (by the quoted prayer of the Complainants) this suit was brought before the statute went into effect. Consequently no penalties could have been incurred under the act at the time of the institution of the suit. See Healy v. Ratta, 292 U. S. 263-268.

The injunction prayed will be denied and defendants' motion to dismiss, as not within the jurisdiction of the Court, will be granted.

If additional orders or rulings are desired, motions therefor may be noted for hearing at the settlement of orders based upon the foregoing ruling, which will also be upon notice.

The Clerk is directed to notify the attorneys for the parties of the filing of this decision.

BERT EMORY HANEY,
Circuit Judge.
EDWARD E. CUSHMAN,
District Judge.
JOHN C. BOWEN,
District Judge.

APPENDIX "C".

Opinion of February 9th, 1938, Requesting Additional Briefs on Jurisdictional Amount.

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

IN EQUITY.

No. 606.

GENE BUCK, Individually, etc., et al., *Complainants,*

vs.

OTTO CASE, as State Treasurer, etc., et al., *Defendants;* KMO, INC., a Corporation, *Intervening Defendant;* JOHN G. LOCKHART, *Intervening Defendant.*

Before Haney, Circuit Judge, and Cushman and Bowen, District Judges.

Seattle, Washington,
February 9th, 1938,
10:00 o'clock A. M.

Judge HANEY:

We have asked counsel—or as many as we could reach of counsel—in the case of Buck et al. vs. Case et al., Number 606, pending in the Court at Tacoma, to appear here this morning.

Earlier we had thought we might ask for re-argument with respect to some questions in that case, but because counsel are so widely dispersed it seems rather unnecessary for us to ask for re-argument.

We do wish to say to such of counsel as are present—and I observe some of them are present—that we think that the right or object to be protected against unconstitutional interference is the right to be free from that interference; we think that the matter in controversy in the instant case is Complainant's right to carry on its business free of the regulation imposed by the Washington statute. The value of that right is the thing that is to be measured by the $3000 limit imposed by the Federal statute.

We invite additional briefs addressed:

(a) To the value of that right,

(b) To where that value may be found in the record.

Such additional briefs may be filed within twenty days from this date by any parties to the litigation, and we direct attention to:

Henneford vs. Northern Pacific Railway Company decided by the Supreme Court January 31st, 1938; KVOS vs. Associated Press, 299 U. S. 269, and McNutt vs. General Motors, 298 U. S. 178. That is all.

We think—that there may be no misunderstanding—that the Clerk should notify all counsel so if counsel are not present they may have an opportunity, if they desire, to file additional briefs on these questions.